Docket for 03-167

(8)

No. 03-167 Status: ARGUED
Title: United States, Petitioner
v.
Carlos Dominguez Benitez
Docketed: August 4, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-50181)
Decision Date: November 25, 2002
Rehearing Denied: May 6, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 4 2003	Petition for writ of certiorari filed. (Response due September 3, 2003)
Aug 11 2003	Waiver of right of respondent Carlos Dominguez Benitez to respond filed.
Aug 27 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 4 2003	Response Requested . (Due October 6, 2003)
Sep 30 2003	Order extending time to file response to petition to and including November 4, 2003.
Nov 3 2003	Response to petition from respondent Carlos Dominguez Benitez filed.
Nov 18 2003	Reply of petitioner United States filed.
Nov 19 2003	DISTRIBUTED for Conference of December 5, 2003.
Dec 8 2003	Petition GRANTED limited to Question 1 presented by the petition.
Jan 7 2004	Motion to appoint counsel filed by respondent.
Jan 9 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 29, 2004.
Jan 21 2004	Motion DISTRIBUTED for Conference of February 20, 2004.
Jan 29 2004	Joint appendix filed.
Jan 29 2004	Brief of petitioner United States filed.
Feb 19 2004	Extension of time within which to file respondent's brief on the merits to and including March 11, 2004.
Feb 23 2004	Motion to appoint counsel filed by respondent GRANTED. Myra D. Mossman, Esq., of Santa Barbara, California is appointed to serve as counsel for the respondent in this case.
Mar 2 2004	SET FOR ARGUMENT WEDNESDAY, APRIL 21, 2004.
Mar 11 2004	Brief amicus curiae of Arnaldo Vicente Infante-Cabrera filed.
Mar 11 2004	Brief of respondent Carlos Dominguez Benitez filed.
Mar 16 2004	Record received from U.S.C.A. 9th Circuitand U.S.D.C. Central District of California. (1 box)
Mar 23 2004	CIRCULATED.
Apr 13 2004	Reply of petitioner United States filed. (Distributed)
Apr 21 2004	Argued. For petitioner: Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Myra D. Mossman, Santa Barbara, Cal. (Appointed by this Court.)

FILED

03 167 AUG 4 - 2003

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.

2. Whether, in deciding whether a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a court of appeals may consider the terms of a written plea agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Rules involved	2
Statement	3
Reasons for granting the petition	14
A. The Ninth Circuit's standard for determining whether a Rule 11 violation is reversible plain error is incorrect and conflicts with decisions of other courts of appeals	15
B. The Ninth Circuit's refusal to consider a plea agreement in deciding whether a Rule 11 violation is reversible plain error is incorrect and conflicts with decisions of other courts of appeals	23
C. The questions presented in this case have recurring importance to the administration of the criminal justice system	27
Conclusion	29
Appendix A	1a
Appendix B	19a
Appendix C	21a
Appendix D	24a
Appendix E	26a
Appendix F	37a

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	18
Blackledge v. *Allison*, 431 U.S. 63 (1977)	27
Johnson v. *United States*, 520 U.S. 461 (1997)	17, 19, 21, 22
Jones v. *United States*, 527 U.S. 373 (1999)	18
McCarthy v. *United States*, 394 U.S. 459 (1969)	21

Cases—Continued: Page

Neder v. *United States*, 527 U.S. 1 (1999) 18
Santobello v. *New York*, 404 U.S. 257 (1971) 27-28
United States v. *Camacho*, 233 F.3d 1308 (11th Cir. 2000), cert. denied, 532 U.S. 951 (2001) 16, 26
United States v. *Chan*, 97 F.3d 1582 (9th Cir. 1996) 20
United States v. *Cotton*, 535 U.S. 625 (2002) 21, 22
United States v. *Diaz-Vargas*, 35 F.3d 1221 (7th Cir. 1994) 26
United States v. *Dixon*, 308 F.3d 229 (3d Cir. 2002) 15, 20
United States v. *General*, 278 F.3d 389 (4th Cir.), cert. denied, 536 U.S. 950 (2002) 26
United States v. *Graibe*, 946 F.2d 1428 (9th Cir. 1991) 18, 24
United States v. *Hyde*, 520 U.S. 670 (1997) 5
United States v. *Jimenez-Dominguez*, 296 F.3d 863 (9th Cir. 2002), cert. denied, 123 S. Ct. 984 (2003) 17
United States v. *Johnson*, 1 F.3d 296 (5th Cir. 1993) 15
United States v. *Jones*, 143 F.3d 1417 (11th Cir. 1998) 26
United States v. *Kennell*, 15 F.3d 134 (9th Cir. 1994) 13, 24
United States v. *Littlejohn*, 224 F.3d 960 (9th Cir. 2000) 17
United States v. *Luna-Orozco*, 321 F.3d 857 (9th Cir. 2003) 17
United States v. *Lyons*, 53 F.3d 1321 (D.C. Cir. 1995) 15
United States v. *Martinez*, 277 F.3d 517 (4th Cir.), cert. denied, 123 S. Ct. 200 (2002) 15, 20
United States v. *Martinez*, 289 F.3d 1023 (7th Cir. 2002) 15

Cases—Continued: Page

United States v. *McCarthy*, 97 F.3d 1562 (8th Cir. 1996), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997) 26
United States v. *Minore*:
292 F.3d 1109 (9th Cir. 2002), cert. denied, 123 S. Ct. 948 (2003) 12-13, 16, 18
302 F.3d 1065 (9th Cir. 2002) 16
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 18
United States v. *Morris*, 286 F.3d 1291 (11th Cir. 2002) 20
United States v. *Noriega-Millan*, 110 F.3d 162 (1st Cir. 1997) 15
United States v. *Olano*, 507 U.S. 725 (1993) 15, 16, 17, 18, 19
United States v. *Pena*, 314 F.3d 1152 (9th Cir. 2003) 17
United States v. *Prado*, 204 F.3d 843 (8th Cir.), cert. denied, 531 U.S. 1042 (2000) 15
United States v. *Raineri*, 42 F.3d 36 (1st Cir. 1994), cert. denied, 515 U.S. 1126 (1995) 20
United States v. *Ruiz*, 536 U.S. 622 (2002) 27
United States v. *Saxena*, 229 F.3d 1 (1st Cir. 2000) 26
United States v. *Vaughn*, 7 F.3d 1533 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994) 15
United States v. *Villalobos*, 333 F.3d 1070 (9th Cir. 2003) 17
United States v. *Vonn*:
224 F.3d 1152 (9th Cir. 2000), vacated, 535 U.S. 55 (2002) 24
294 F.3d 1093 (9th Cir. 2002) 24
531 U.S. 1189 (2001) 11
535 U.S. 55 (2002) ..... *passim*
United States v. *Westcott*, 159 F.3d 107 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999) 15

Cases—Continued: Page

United States v. *Williams*, 899 F.2d 1526 (6th Cir. 1990) 26
Williams v. *United States*, 503 U.S. 193 (1992) 18

Statutes, rules and regulations:

21 U.S.C. 841(a)(1) 3, 4
21 U.S.C. 841(b)(1)(A)(viii) 4
21 U.S.C. 846 ..... 3, 4, 5
Fed. R. Crim. P.:
Rule 11 ..... *passim*
Rule 11(c)(1)(B) 3, 5
Rule 11(c)(2) 3
Rule 11(c)(3)(B) 3, 6
Rule 11(e) (1989) 2
Rule 11(e)(1)(B) (1989) 2, 5
Rule 11(e)(2) (1989) 2, 6, 9, 11, 12
Rule 11(h) (1999) 11, 12, 15, 19
Rule 11(h) advisory committee note (1983 Amendments) 11, 19, 25
Rule 52(a) (1944) 11
Rule 52(b) (1944) 3, 11, 12, 15, 17, 18
Rule 52 advisory committee note (2002 Amendments) 3
United States Sentencing Guidelines:
§ 2D1.1(b)(6) 5
§ 5C1.2(a) 5
§ 5C1.2(a)(1) 10
§ 5G1.1(c)(2) 10
Ch. 5, Pt. A 6, 10

Miscellaneous:

Administrative Office of the U.S. Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts* 28

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 310 F.3d 1221. A prior opinion of the court of appeals (App., *infra*, 21a-23a) that was withdrawn and then partially reinstated is unpublished but is reported at 30 Fed. Appx. 706.

JURISDICTION

The initial judgment of the court of appeals was entered on January 29, 2002. The judgment of the court of appeals of which review is sought was entered on November 25, 2002. A petition for rehearing was

denied on May 6, 2003. App., *infra*, 24a-25a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. At the time respondent pleaded guilty, Rule 11(e) of the Federal Rules of Criminal Procedure (1989), titled "Plea Agreement Procedure," provided, in relevant part, as follows:

> **(1) In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do * * * the following:
>
> * * * *
>
> **(B)** make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court[.]
>
> * * * *
>
> **(2) Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. * * * If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.[1]

2. At the time the court of appeals issued its decision, Rule 52(b) of the Federal Rules of Criminal Procedure (1944), titled "Plain Error," provided as follows: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[2]

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Central District of California of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to 120 months' imprisonment, to be followed by five years of supervised release. The court of appeals reversed respondent's conviction and remanded for further proceedings.

1. Acting on information that respondent was distributing methamphetamine, a confidential informant (CI) working for law enforcement agents contacted respondent and negotiated a purchase of several pounds of methamphetamine. On May 13, 1999, respondent, accompanied by two co-defendants, drove to a restaurant in Anaheim, California, where the drugs were to be delivered to the CI. Respondent got out of the car with a co-defendant, who was carrying a plastic shop-

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[1] The current versions of these provisions, which are substantively identical in relevant respects, are set forth in Fed. R. Crim. P. 11(c)(1)(B), (c)(2), and (c)(3)(B).

[2] Six days after the court of appeals' November 25, 2002, decision, an amendment to Rule 52(b) took effect. The change is "stylistic only." Fed. R. Crim. P. 52 advisory committee note (2002 Amendments).

ping bag, and the two men then got into the CI's car. Minutes later, agents conducting surveillance responded to the CI's signal and arrested respondent and his co-defendants. When the agents searched the shopping bag, they found a plastic bag and a shoe box, each of which contained methamphetamine. During a post-arrest interview, respondent admitted his participation in the crime. PSR ¶¶ 15-41.

2. On May 28, 1999, a federal grand jury returned an indictment charging respondent and his co-defendants with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1), and possession with intent to distribute 1,391 grams of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1). Resp. C.A. E.R. Tab 3. A conviction for an offense involving at least 500 grams of a mixture or substance containing methamphetamine is punishable by a minimum prison term of 10 years and a maximum prison term of life. See 21 U.S.C. 841(b)(1)(A)(viii), 846.

3. On September 8, 1999, approximately six weeks before trial was scheduled to begin, respondent sent the district court a letter requesting new counsel. Resp. C.A. E.R. Tab 4, at 2; Resp. C.A. E.R. Tab 7, at 2. The asserted basis for the request was that respondent's court-appointed lawyer had been encouraging him to accept a plea offer that he did "not feel [was] appropriate." Resp. C.A. E.R. Tab 7, at 2. At a status conference on October 7, 1999, respondent advised the district court that "[t]he only thing I'm looking for is * * * a better deal"; acknowledged that he was seeking "a disposition of [his] case other than trial"; and added that "[a]t no time have I decided to go to any trial." Resp. C.A. E.R. Tab 5, at 7. At the same conference,

respondent's counsel confirmed that his client "doesn't want a trial." *Id.* at 12. The district court denied respondent's request for new counsel. *Id.* at 14.

4. On October 12, 1999, respondent executed a written, "type B," plea agreement. App., *infra*, 26a-36a. In a type B agreement, the government "agrees to recommend (or not oppose the defendant's request for) a particular sentence." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997).[3] The agreement contained a number of stipulations, including the stipulation that respondent should receive a two-level reduction in his offense level under the "safety valve" provisions of the Sentencing Guidelines. App., *infra*, 29a.[4] The parties, however, agreed only that respondent satisfied three of the five safety-valve criteria—no violence or possession of a weapon during the offense, no death or serious bodily

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[3] At the time of respondent's plea, this type of agreement was described in Fed. R. Crim. P. 11(e)(1)(B). It is now described in Fed. R. Crim. P. 11(c)(1)(B).

[4] Under the Guidelines' safety-valve provisions, the defendant is entitled to a two-level reduction under Section 2D1.1(b)(6) if the criteria set forth in Section 5C1.2(a) are met. Section 5C1.2(a), in turn, provides that a defendant convicted of certain drug offenses, including conspiracy under 21 U.S.C. 846, is to be sentenced "in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)." Those criteria are that (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant did not occupy an organizational, leadership, managerial, or supervisory role in the offense and was not engaged in a continuing criminal enterprise (CCE); and (5) the defendant truthfully provided complete information concerning the offense before sentencing.

injury from the offense, and no aggravating role or participation in a CCE—and specifically stated that there was "no agreement as to [respondent's] criminal history or criminal history category." *Id.* at 30a. The agreement also stated that, "[a]bsent a determination by the Court that [respondent's] case satisfies the [safety-valve] criteria * * * , the statutory mandatory minimum sentence that the Court must impose * * * is ten years['] imprisonment." *Id.* at 27a. If respondent had received all the sentencing reductions outlined in the agreement, including the safety-valve reduction, his guidelines range, based on an offense level of 27 and a criminal history category of I, would have been 70 to 87 months' imprisonment. See Sentencing Guidelines Ch. 5, Pt. A.

In the plea agreement, the parties acknowledged that the stipulations "do not bind * * * the Court," App., *infra*, 30a, which is "not a party to th[e] agreement and need not accept any of the [government's] sentencing recommendations or the parties' stipulations," *id.* at 33a. Paragraph 19 of the agreement included an expanded statement of the advice that was then required by Fed. R. Crim. P. 11(e)(2): that "the defendant * * * has no right to withdraw the plea" if "the court does not accept the recommendation or request" for a particular sentence.[5] Paragraph 19 stated that, "[e]ven if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute," respondent "cannot, for that reason, withdraw [his] guilty plea, and [he] will remain

[5] In the current version of Rule 11, this required advice is found in subsection (c)(3)(B). It is identical in substance to the provision in effect at the time of respondent's plea.

bound to fulfill all [his] obligations under this agreement." App., *infra*, 33a-34a.

The agreement was signed by respondent, a Spanish translator, respondent's counsel, and the prosecutor. App., *infra*, 34a-36a. In signing the agreement, respondent acknowledged that it had been read to him in Spanish, that he had "carefully discussed every part of it with [his] attorney," and that he "underst[oo]d" and "voluntarily agree[d]" to its terms. *Id.* at 35a. The signature of respondent's counsel was preceded by an acknowledgment that he had "carefully discussed every part of th[e] agreement with [respondent]." *Id.* at 35a.

5. On October 13, 1999, respondent appeared for a change-of-plea hearing, Resp. C.A. E.R. Tab 6, at which the district court conducted the colloquy required by Fed. R. Crim. P. 11. A substantial portion of the colloquy was a review of the plea agreement, Resp. C.A. E.R. Tab 6, at 10-26, which was filed and thereby made part of the record, Resp. C.A. E.R. Tab 14, at 10. Before reviewing the agreement, however, the court emphasized that it "is not a party to th[e] plea agreement" and that "at this time no one has promised [respondent] or figured out what [his] sentence should be." Resp. C.A. E.R. Tab 6, at 10. The court then asked, "As you stand here now, has anybody promised you what the actual sentence will be in your case?" *Ibid.* Respondent answered "[n]o." *Ibid.*

The district court then confirmed that the signature on the agreement was respondent's, that respondent had signed the agreement the day before, and that the acknowledgment preceding respondent's signature was accurate. Resp. C.A. E.R. Tab 6, at 10-12. After addressing the nature of the charge to which respondent was pleading guilty, *id.* at 12-13, the court turned to the section of the plea agreement that covered potential

penalties, *id.* at 13-15. During the ensuing portion of the colloquy, the following exchange took place:

> THE COURT: In the next section of the plea agreement, there is a discussion about the penalties that you face.
>
> You are reminded that absent a determination by the Court that your case satisfies the * * * safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.
>
> Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4 [of the agreement]?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?
>
> THE DEFENDANT: No.
>
> THE COURT: So you realize the Court may give you a ten-year sentence or more, as provided by law?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Knowing that, do you still want to go forward with your guilty plea?
>
> THE DEFENDANT: Yes.

Id. at 13-14.

After addressing the factual basis for the plea, Resp. C.A. E.R. Tab 6, at 15-16, and the constitutional rights

that respondent was waiving by pleading guilty, *id.* at 16-18, the district court turned to the section of the plea agreement that covered Sentencing Guidelines factors, *id.* at 18-20. During the portion of the colloquy that followed, the court referred to the safety valve as a "possibility," *id.* at 19, and asked respondent whether he understood that the "predictions" in the plea agreement were "not going to be binding on * * * the Court," *ibid.* Respondent answered "[y]es." *Ibid.* The court then noted that the parties had stipulated that three of the five safety-valve criteria were satisfied, *ibid.*, and again asked respondent whether he understood that "these stipulations are not binding on the Court," *id.* at 20. Respondent said "I do." *Ibid.*

Later in the hearing, the district court informed respondent that paragraph 19 of the plea agreement outlined "the circumstances under which you may or may not be allowed to withdraw your guilty plea." Resp. C.A. E.R. Tab 6, at 26. The court did not review that provision "word by word," however, *ibid.*, and made no further mention of the circumstances under which respondent would be able to withdraw his plea. In particular, the court did not comply with Rule 11(e)(2)'s requirement that the defendant be advised that he could not withdraw his plea if the court did not accept the parties' sentencing recommendations. Respondent did not object to the omission. See *ibid.*

At the conclusion of the hearing, the district court accepted respondent's guilty plea. Resp. C.A. E.R. Tab 6, at 28. It found that respondent "understands the terms of the plea agreement which we have reviewed at some length," and that he "understands that the plea agreement is not binding upon the Court when it comes time for sentencing." *Ibid.* The court also found that respondent "understands each and all of his consti-

tutional rights," that he "knowingly, intelligently, and voluntarily waived those rights," and that he "made his guilty plea freely and voluntarily." *Id.* at 30.

6. In the Presentence Report, the Probation Office concluded, contrary to the expectations of counsel, that respondent had three prior convictions and five criminal history points. PSR ¶¶ 70-92. The discrepancy between the Probation Office's conclusion and counsel's expectations was attributable to the fact that, when they negotiated the plea agreement, neither the prosecutor nor respondent's attorney was aware that respondent had two convictions under other names. Resp. C.A. E.R. Tab 13, at 14-18. Because respondent had more than one criminal history point, he was not eligible for the safety valve. See Sentencing Guidelines § 5C1.2(a)(1). With an offense level of 29 and a criminal history category of III, respondent was subject to a guidelines imprisonment range of 108 to 135 months. See *id.* Ch. 5, Pt. A. The statutory minimum prison term of 120 months, however, effectively became the low end of the range. See *id.* § 5G1.1(c)(2).

At his March 13, 2000, sentencing hearing, respondent complained about his attorney's representation, Resp. C.A. E.R. Tab 13, at 9-15, but repeatedly stated that he accepted responsibility for his criminal conduct, *id.* at 9-12. After denying his request for the appointment of new counsel, *id.* at 9-20, the district court sentenced respondent to 120 months' imprisonment, *id.* at 20-23; Resp. C.A. E.R. Tab 2, at 1. Respondent never filed a motion to withdraw his plea in the district court. See Resp. C.A. E.R. Tab 14.

7. On appeal, respondent contended that the district court had abused its discretion in denying his request for substitute counsel and that his attorney had provided ineffective assistance. Resp. C.A. Br. 21-37. He

also claimed, for the first time, that the district court had violated Rule 11(e)(2) by failing to advise him at his change-of-plea hearing that he could not withdraw his plea if the parties' sentencing recommendations were rejected. *Id.* at 17-21. The government conceded that the court had not complied with Rule 11(e)(2), Gov't C.A. Br. 17, and acknowledged that, under then-existing Ninth Circuit precedent, the error was subject to harmless-error review under Fed. R. Crim. P. 11(h), *ibid.*[6] Noting this Court's recent grant of certiorari in *United States* v. *Vonn*, 531 U.S. 1189 (2001), the government took the position that plain-error review under Rule 52(b) (rather than harmless-error review under Rule 11(h)) should apply to forfeited claims of Rule 11 error, Gov't C.A. Br. 17 n.2, but argued that respondent was not entitled to relief even under the harmless-error standard, because, among other things, he had been made aware by paragraph 19 of the plea agreement that he could not withdraw his plea if the court rejected the parties' sentencing recommendations, *id.* at 18-21.

On January 29, 2002, the court of appeals issued an unpublished decision in which it affirmed the denial of respondent's motion for substitute counsel and declined to address his ineffective-assistance claim, but agreed

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[6] At the time of appeal, Rule 11(h) provided that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Subsection (h) was added to Rule 11 to "make[] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments). At the time of appeal, Rule 52(a) provided that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The current versions of Rules 11(h) and 52(a) are identical in substance to the earlier versions.

that the district court had violated Rule 11(e)(2) and found that the error was not harmless. App., *infra*, 21a-23a. Although it concluded that respondent's guilty plea should be vacated and the case remanded to permit respondent to enter a new plea, *id.* at 22a, the court, on its own motion, stayed issuance of its mandate pending this Court's decision in *Vonn*, *id.* at 21a.

On March 4, 2002, this Court issued its decision in *Vonn*, 535 U.S. 55, which included two holdings. The first was that forfeited claims of Rule 11 error are reviewed under the plain-error standard of Rule 52(b), rather than the harmless-error standard of Rule 11(h). *Id.* at 62-74. The second holding was that, in determining whether a district court's violation of Rule 11 is reversible error, a reviewing court is not limited to the plea transcript, but may consider other portions of the record (in that case, transcripts of two earlier proceedings). *Id.* at 74-76. The court of appeals subsequently withdrew its decision and directed the parties to file supplemental briefs addressing the effect of *Vonn*. See Gov't Supp. C.A. Br. 1.

8. On November 25, 2002, the court of appeals, this time by a divided vote, again vacated respondent's conviction based on the Rule 11 violation and remanded for further proceedings.[7]

a. Applying the plain-error standard mandated by *Vonn*, App., *infra*, 4a-5a, the majority determined that the district court's failure to comply with Rule 11(e)(2) was an "error" that was "plain," *id.* at 5a. Citing *United States* v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 123 S. Ct. 948 (2003), the majority then held that a plain error affects "substantial rights" if the defendant shows that "the court's error was not minor or technical" and that "he did not understand the rights at issue when he entered his guilty plea." App., *infra*, 5a. The majority found that respondent had made both showings. It concluded that the error was not "minor or technical" because respondent's sentence "was substantially higher than the one for which [he] bargained." *Id.* at 6a. And it concluded that he did not understand his right to withdraw his plea despite paragraph 19 of the plea agreement. Quoting *United States* v. *Kennell*, 15 F.3d 134, 136 (9th Cir. 1994), the majority relied on what that decision had characterized as the "marked difference" between "being warned in open court by a district judge" and "reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of [the] plea," and held that "the reading of [a] plea agreement is not a substitute for rigid observance of Rule 11." App., *infra*, 6a. The majority deemed "unpersuasive" the government's argument that *Vonn* had undermined *Kennell*, reasoning that, although *Vonn* authorizes appellate courts to consider warnings given to the defendant at an earlier stage of the case, it does not address the issue of plea agreements. *Id.* at 7a. The majority then concluded that it would exercise its discretion to remedy the Rule 11 error, in order to prevent the "miscarriage of justice" that would result if respondent were required to serve a sentence that exceeded the one he expected. *Id.* at 10a.

b. Judge Tallman dissented. App., *infra*, 10a-18a. In his view, the "cumulative effect of [respondent's] signed plea agreement *and* the questions posed to [him] during the plea colloquy," *id.* at 11a, conclusively demonstrated

[7] In a contemporaneous unpublished decision, the court of appeals unanimously reinstated, verbatim, that portion of its prior unpublished decision that addressed respondent's substitution and ineffective-assistance claims. App., *infra*, 19a-20a.

that he "understood the binding nature of his guilty plea," *id.* at 12a, and thus that "no plain error attends his conviction and sentence," *id.* at 11a. The dissent criticized the majority for "elevat[ing] form over substance by looking only to see if the 'magic words' were spoken in the colloquy, while the Supreme Court tells us to apply the plain error rule to the record as a whole." *Id.* at 12a. In the dissenting judge's view, a plea agreement is as much a part of the record as a transcript of a prior proceeding, and there is no justification for failing to apply *Vonn* to a plea agreement. *Id.* at 11a-12a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a Rule 11 error affects a defendant's "substantial rights" if the error is neither minor nor technical and the defendant did not understand the right at issue when he entered his plea. It also held that, in deciding whether the defendant understood his rights, a court of appeals may not consider a written plea agreement that fully and accurately states the Rule 11 advice omitted by the district court. Each of these holdings is erroneous. Each perpetuates a circuit conflict. Each is in considerable tension with a principle of plain-error review established by this Court. And each has recurring importance to the federal criminal justice system because of its potential effect on the large number of appeals of convictions obtained by guilty plea in the largest circuit in the country. This Court should grant certiorari to review both aspects of the court of appeals' decision.

A. The Ninth Circuit's Standard For Determining Whether A Rule 11 Violation Is Reversible Plain Error Is Incorrect And Conflicts With Decisions Of Other Courts Of Appeals

The court of appeals' standard for determining whether a violation of Rule 11 affected substantial rights under Rule 52(b) is inconsistent with the position of every other court of appeals to consider the question. It is also incorrect.

1. Applying the general principle that an error affects substantial rights if it "affect[s] the outcome of the district court proceedings," *United States* v. *Olano*, 507 U.S. 725, 734 (1993), nine circuits—the D.C., First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth—have concluded that a Rule 11 error affects substantial rights if the defendant would not have pleaded guilty had the error not occurred. See, *e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995); *United States* v. *Noriega-Millan*, 110 F.3d 162, 167 (1st Cir. 1997); *United States* v. *Westcott*, 159 F.3d 107, 112-113 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999); *United States* v. *Dixon*, 308 F.3d 229, 234 (3d Cir. 2002); *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.), cert. denied, 123 S. Ct. 200 (2002); *United States* v. *Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (en banc); *United States* v. *Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002); *United States* v. *Prado*, 204 F.3d 843, 846 (8th Cir.), cert. denied, 531 U.S. 1042 (2000); *United States* v. *Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994).[8] The Eleventh Cir-

[8] While some of these cases applied the plain-error standard of Rule 52(b), others applied the harmless-error standard of Rule 11(h). Each permits reversal only when the error affected substantial rights. (Insofar as the "substantial rights" component is

cuit, in contrast, has held that a Rule 11 error affects substantial rights when it implicates one of the rule's three "core" concerns or objectives: absence of coercion, understanding of the charges, and knowledge of the consequences of the plea. See, *e.g.*, *United States* v. *Camacho*, 233 F.3d 1308, 1314 (11th Cir. 2000), cert. denied, 532 U.S. 951 (2001). The Ninth Circuit has also rejected the majority view. It has held, as it did in this case, App., *infra*, 5a, that, "for purposes of plain error review, a defendant's substantial rights are affected by Rule 11 error where the defendant proves that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." *United States* v. *Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002), cert. denied, 123 S. Ct. 948 (2003). There is thus a clear circuit conflict on the standard for determining when a forfeited claim of Rule 11 error constitutes reversible plain error, a conflict that was explicitly recognized in the opinion dissenting from the denial of panel rehearing in the case in which the Ninth Circuit's standard was adopted. See *United States* v. *Minore*, 302 F.3d 1065, 1066-1067 (9th Cir. 2002) (Schwarzer, J., dissenting).[9]

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concerned, the only difference between the plain-error rule and the harmless-error rule is that the former places the burden of persuasion on the defendant while the latter places it on the government. See *Vonn*, 535 U.S. at 62-63; *Olano*, 507 U.S. at 734.) The cases that have applied the harmless-error standard to a Rule 11 error have done so either because the objection was preserved or because the case was decided before *Vonn*, when some courts of appeals employed harmless-error analysis even for forfeited claims of Rule 11 error.

[9] The Ninth Circuit has occasionally deviated from the standard it adopted in *Minore*. In one subsequent case, a panel applied the standard employed by the majority of circuits and held that a Rule 11 violation did not constitute reversible plain error because the defendant could not show that "he would not have pled guilty" but for the violation. *United States* v. *Luna-Orozco*, 321 F.3d 857, 860 (2003). See also *United States* v. *Villalobos*, 333 F.3d 1070, 1075 (9th Cir. 2003) (holding that Rule 11 error was not harmless because government "cannot show that [the defendant] 'would still have pleaded guilty absent the Rule 11 error'"); *United States* v. *Littlejohn*, 224 F.3d 960, 970 (9th Cir. 2000) (holding that Rule 11 error was harmless because it "does not appear to have affected the outcome of the proceedings below—that is, [the defendant's] decision to plead guilty"). In another post-*Minore* case, a panel of the Ninth Circuit applied the Eleventh Circuit's standard and held that a Rule 11 violation was reversible plain error because it entailed a "failure to satisfy a core concern of Rule 11" (in that case, advising the defendant of the nature of the charges). *United States* v. *Pena*, 314 F.3d 1152, 1157 (2003). But Ninth Circuit panels applied the *Minore* standard both in this case and in *United States* v. *Jimenez-Dominguez*, 296 F.3d 863, 867-869 (2002), cert. denied, 123 S. Ct. 984 (2003), thus demonstrating that the standard has continuing vitality. It does not appear likely that the Ninth Circuit will ultimately settle on a different standard, because the en banc court rejected the government's request to abandon the *Minore* standard and replace it with the one employed by the majority of circuits. See App., *infra*, 24a-25a.

2. Under Rule 52(b), a court of appeals must reject a forfeited claim unless there was (1) an error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *Olano*, 507 U.S. at 732-737. A defendant who raises a claim of Rule 11 error for the first time on appeal, but cannot show that he would not have pleaded guilty if he had received the advice omitted by the district court, cannot satisfy either the third or the fourth requirement of the plain-error rule. The Ninth Circuit's contrary conclusion is erroneous.

a. In *Minore*, the plain-error decision on which it relied in this case, see App., *infra*, 5a, the Ninth Circuit adopted the definition of "affecting substantial rights" that it had adopted in a Rule 11 harmless-error case, *United States* v. *Graibe*, 946 F.2d 1428, 1433-1434 (1991). See *Minore*, 292 F.3d at 1118. *Graibe*, however, antedated this Court's decision in *Olano*, which established the general test for whether a forfeited claim of error "affect[ed] substantial rights" under Rule 52(b). The standard adopted by the Ninth Circuit in *Graibe* is not consistent with the standard adopted by this Court in *Olano*.

In most cases, *Olano* made clear, an effect on substantial rights has the same meaning in the plain-error context that it has in the harmless-error context. 507 U.S. at 734. It "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Ibid.* This Court has applied that principle to various types of judicial proceedings, in both plain-error and harmless-error cases. An error in a grand jury proceeding is prejudicial if it "had an effect on the grand jury's decision to indict," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); an error at a detention hearing is prejudicial if it had an effect on the court's decision to order the defendant detained, see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); an error at a trial is prejudicial if it "influenced the verdict," *Olano*, 507 U.S. at 740; accord *Neder* v. *United States*, 527 U.S. 1, 17 (1999) (trial error is not prejudicial if "the jury verdict would have been the same absent the error"); and an error at a sentencing hearing is prejudicial if it affected the sentence imposed, see *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999); see also *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (sentencing error is not

prejudicial if "the error did not affect the district court's selection of the sentence").

The same principle should apply when the judicial proceeding is a change-of-plea hearing. As the majority of circuits have held, a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, only if it affected the defendant's decision to plead guilty. There is nothing in either the holding or the logic of *Olano* that suggests that a plea proceeding is not one of the "proceedings" whose outcome must have been affected for there to have been an effect on substantial rights. See 507 U.S. at 734-735. And the Advisory Committee Note accompanying Rule 11's harmless-error provision—which directs appellate courts to disregard errors that do not "affect substantial rights," Fed. R. Crim. P. 11(h)—approvingly cites cases that applied harmless-error analysis when the error "could not have had any impact on the defendant's decision to plead." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments).[10]

The inquiry into whether the defendant would have pleaded guilty in the absence of the Rule 11 error is broader than the inquiry undertaken by the Ninth Circuit, which is whether the defendant was otherwise aware of the information omitted by the district court during the Rule 11 colloquy. If the defendant *was* otherwise aware of the information—because, for example, as in *Vonn*, he received the information at an

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[10] Rule 11 errors do not fall within the "special category of forfeited errors that can be corrected regardless of their effect on the outcome." *Olano*, 507 U.S. at 735. See *Johnson*, 520 U.S. at 468-469 (listing "very limited class of cases" involving "structural" error). The Eleventh Circuit's rule —that certain types of Rule 11 error always affect substantial rights—is therefore incorrect as well.

earlier stage of the case—but nonetheless pleaded guilty, it will usually follow that the district court's failure to provide him with the same information during the plea colloquy did not affect his decision to plead guilty. But while awareness of the omitted advice is ordinarily a sufficient basis for finding that a Rule 11 error did not affect substantial rights, it is not necessary. There are circumstances in which a court could conclude that the defendant was determined enough to plead guilty that he would have done so despite not being otherwise aware of the information omitted from the Rule 11 colloquy. One such circumstance, for example, is where the defendant received a significantly reduced sentence in exchange for his plea. See, *e.g.*, *Dixon*, 308 F.3d at 235; *Martinez*, 277 F.3d at 532-533.[11]

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[11] There are also cases in which a court could conclude that a Rule 11 error had no effect on the outcome of the proceedings, and thus had no effect on the defendant's substantial rights, even without a retrospective assessment of whether the defendant would have pleaded guilty had there been no error. See, *e.g.*, *United States* v. *Morris*, 286 F.3d 1291, 1293-1295 (11th Cir. 2002) (district court's failure to mention possibility of restitution during Rule 11 colloquy was harmless error, since defendant had notice that he might be required to pay fine of greater amount than amount of restitution that was ordered); *United States* v. *Chan*, 97 F.3d 1582, 1583-1584 (9th Cir. 1996) (district court's failure to advise defendant that he could not withdraw plea if court did not accept non-binding sentencing recommendation was harmless error, since court accepted recommendation); *United States* v. *Raineri*, 42 F.3d 36, 40-42 (1st Cir. 1994) (district court's erroneous advice about maximum sentence was harmless when court imposed sentence below maximum identified during Rule 11 colloquy and there was no reason to believe that defendant expected lesser penalty), cert. denied, 515 U.S. 1126 (1995).

b. Even if the question whether a defendant would have pleaded guilty in the absence of a Rule 11 error has no bearing on the third component of the plain-error rule—whether the error affected the defendant's substantial rights—it is certainly relevant to the fourth component—whether the error seriously affected the fairness, integrity, or public reputation of the proceedings. The advice of rights required by Rule 11 is not constitutionally required, but is intended to ensure that a defendant's guilty plea conforms to constitutional standards—*i.e.*, that it is intelligent and voluntary. See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). If a defendant acted knowingly and voluntarily in pleading guilty and was sufficiently determined to plead guilty that the advice the district court failed to give would have been insignificant to the plea decision, it cannot be said that the omission affected the fairness, integrity, or public reputation of the plea proceeding. A court of appeals should not exercise its discretion to notice a forfeited Rule 11 error, therefore, unless the defendant shows that he would not have pleaded guilty in the absence of the error. A rule, like the Ninth Circuit's, that permits a defendant to enter, without objection, a solemn plea of guilty that conforms to constitutional standards, and then, only after sentence and entry of judgment, escape the effect of his plea because of an error that was of no consequence to his decision to plead guilty, would elevate minor flaws over substantial justice and would not command public confidence.

This view is consistent with the approach employed in *Johnson* v. *United States*, 520 U.S. 461 (1997), and *United States* v. *Cotton*, 535 U.S. 625 (2002), where the Court assumed, without deciding, that the failure to charge an element of the offense in the indictment

(*Cotton*) or submit it to the jury (*Johnson*) satisfied the third requirement of the plain-error rule, but concluded that the error did not satisfy the fourth requirement, because the evidence supporting the omitted element was "overwhelming" and "essentially uncontroverted." 535 U.S. at 633; 520 U.S. at 470. The Court concluded, in other words, that the omission did not seriously affect the fairness, integrity, or public reputation of the grand jury proceeding (*Cotton*) or trial (*Johnson*) because there was no doubt about what the outcome of the proceeding would have been if there had been no error.

3. The court of appeals rejected the government's argument that respondent had to show that he would not have pleaded guilty if the district court had provided the omitted Rule 11 advice, see Gov't Supp. C.A. Br. 9-10, and it clearly applied a different standard, App., *infra*, 5a-9a. Under the correct standard, respondent cannot establish reversible plain error, because he cannot show that, but for the Rule 11 error, he would not have pleaded guilty.

As an initial matter, the advice omitted by the district court was fully and accurately set forth in the plea agreement that the district court explicitly found the defendant understood. Resp. C.A. E.R. Tab 6, at 28. As explained below, see pp. 23-26, *infra*, the court of appeals should have considered the agreement in deciding whether the Rule 11 violation was reversible plain error. Since respondent was aware of the omitted advice, the district court's failure to mention it during the plea colloquy could not have influenced his decision to plead guilty.

But respondent would be unable to show that the Rule 11 error affected that decision even if the plea agreement were disregarded. First, before he pleaded

guilty, respondent clearly stated that he was not interested in going to trial and was concerned only with obtaining the most favorable possible plea bargain. Resp. C.A. E.R. Tab 5, at 7. Even after he became aware that he would not receive the safety-valve reduction, respondent repeatedly stated that he accepted responsibility for his crime. Resp. C.A. E.R. Tab 13, at 12. Second, at the change-of-plea hearing, the district court took care to ensure that respondent understood that the safety-valve reduction was a contingency, not a guarantee, and that no one could promise him a particular sentence. See Resp. C.A. E.R. Tab 6, at 10-28. Third, respondent had a substantial incentive to plead guilty even without the two-level safety-valve reduction, because a conviction after trial would have precluded the stipulated three-level reduction for acceptance of responsibility, see App., *infra*, 29a, and would have subjected him to a guidelines sentence of at least 151 to 188 months' imprisonment. See Sentencing Guidelines Ch. 5, Pt. A.

B. The Ninth Circuit's Refusal To Consider A Plea Agreement In Deciding Whether A Rule 11 Violation Is Reversible Plain Error Is Incorrect And Conflicts With Decisions Of Other Courts Of Appeals

The court of appeals held that, in determining whether a Rule 11 violation constitutes reversible plain error, an appellate court may not consider the contents of a written plea agreement. That holding is erroneous. It also conflicts with the decisions of all the other courts of appeals to have considered the question.

1. In the decision that this Court reviewed in *Vonn*, the Ninth Circuit applied its longstanding rule that, when a court decides whether a Rule 11 error affected

the defendant's substantial rights, the record that it reviews is limited to the plea proceeding. *United States* v. *Vonn*, 224 F.3d 1152, 1155 (2000), vacated, 535 U.S. 55 (2002). For that proposition, the court of appeals cited a number of cases, including *United States* v. *Graibe*, 946 F.2d 1428, 1434-1435 (9th Cir. 1991). See 224 F.3d at 1155. This Court rejected that view. It held that a reviewing court is permitted to look "outside the four corners of the transcript of the plea hearing and Rule 11 colloquy"; that "there are circumstances in which defendants may be presumed to recall information provided to them prior to the plea proceeding"; and that the defendant's initial appearance and arraignment were "relevant" parts of the record to be "considered" in deciding whether a violation of Rule 11 was reversible error. 535 U.S. at 75.

In this case, the Ninth Circuit applied its long-standing rule that, when a court decides whether a Rule 11 error affected the defendant's substantial rights, the record that it reviews does not include the plea agreement. App., *infra*, 6a-9a. For that proposition, the court relied principally on *United States* v. *Kennell*, 15 F.3d 134, 136 (9th Cir. 1994), see App., *infra*, 6a, which in turn had cited *Graibe* for the principle that appellate courts "are limited to the contents of the record of the plea proceeding," 15 F.3d at 138. Despite the fact that this Court explicitly rejected that principle in *Vonn*, see *United States* v. *Vonn*, 294 F.3d 1093, 1093-1094 (9th Cir. 2002) (noting, on remand, that *Vonn* "overruled" Ninth Circuit precedent "confining [the court's] review to the record of the defendant's plea proceeding"), the court of appeals adhered to *Kennell*. Effectively limiting *Vonn* to its precise facts, the court of appeals found that "[t]he *Kennell* court's concern with respect to the difference between a defendant reading boiler-plate language in an agreement and being advised of a fact in open court is no less valid after *Vonn*." App., *infra*, 7a.

The court of appeals erred in concluding that *Kennell* survives *Vonn*. As framed by this Court, the question presented in *Vonn* was whether an appellate court addressing a claim of Rule 11 error "is limited to examining the record of the colloquy * * * when the guilty plea was entered, or may look to the entire record begun at the defendant's first appearance in the matter leading to his eventual plea." 535 U.S. at 59. In holding that an appellate court may consider "the entire record," *ibid.*, this Court relied principally on the Advisory Committee's statement that the prejudicial effect of a Rule 11 error is to be resolved on the basis of both "the Rule 11 transcript" and "the other portions * * * of the limited record made in such cases," *id.* at 74 (quoting Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments)) (internal quotation marks omitted). A filed plea agreement is no less a "portion" of the "entire record" leading up to the plea than a transcript of the initial appearance or arraignment. Neither the Advisory Committee, in the note accompanying Rule 11(h), nor this Court, in *Vonn*, drew any distinction among types of record evidence. Nor did the Committee or this Court draw a distinction between a judge's statement to a defendant in open court and a written plea agreement that a defendant acknowledges having read, discussed with counsel, and understood. Indeed, it is difficult to conceive of a justification for permitting consideration of proceedings that, as in *Vonn*, see 535 U.S. at 59-60, occurred months before the guilty plea, while categorically prohibiting consideration of a plea agreement that, as in this case, was read,

reviewed with counsel, and executed only a day before the plea.

2. By reaffirming the holding of *Kennell*, the court of appeals' decision not only misinterpreted *Vonn* but perpetuated a conflict with pre-*Vonn* decisions of six other courts of appeals holding that a written plea agreement may be considered in determining whether a Rule 11 violation affected substantial rights (either on harmless-error or on plain-error review). See, *e.g.*, *United States* v. *General*, 278 F.3d 389, 394-395 (4th Cir.), cert. denied, 536 U.S. 950 (2002); *United States* v. *Camacho*, 233 F.3d 1308, 1321 (11th Cir. 2000), cert. denied, 532 U.S. 951 (2001); *United States* v. *Saxena*, 229 F.3d 1, 9 (1st Cir. 2000); *United States* v. *McCarthy*, 97 F.3d 1562, 1576 (8th Cir. 1996), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997); *United States* v. *Diaz-Vargas*, 35 F.3d 1221, 1225-1226 (7th Cir. 1994); *United States* v. *Williams*, 899 F.2d 1526, 1531 (6th Cir. 1990). In several of those cases, the Rule 11 violation was the very one at issue here: the failure to advise the defendant that he would not be able to withdraw his plea if the district court did not follow the parties' sentencing recommendations. See *Camacho*, 233 F.3d at 1319-1322; *Saxena*, 229 F.3d at 8-9; *McCarthy*, 97 F.3d at 1574-1576; *Diaz-Vargas*, 35 F.3d at 1224-1226. This clear circuit conflict has been explicitly recognized by other courts of appeals. See *United States* v. *Jones*, 143 F.3d 1417, 1419 (11th Cir. 1998); *McCarthy*, 97 F.3d at 1576.

3. If this Court were to reject the Ninth Circuit's cramped reading of *Vonn* and hold that a plea agreement may be considered in deciding whether a Rule 11 violation is reversible plain error, there is no question that respondent would be unable to obtain reversal of his conviction. In his plea agreement, respondent ex-

pressly acknowledged that he could not withdraw his plea if the district court declined to accept the parties' sentencing recommendations. App., *infra*, 33a-34a. Respondent signed an acknowledgment that he understood the agreement and that he had "carefully discussed every part" of it with his attorney. *Id.* at 35a. During the plea colloquy the next day, respondent reaffirmed his signed acknowledgment and, after explicitly acknowledging that he might not receive the safety-valve reduction, stated that he nevertheless wished to go forward with the plea. Resp. C.A. E.R. Tab 6, at 10-20. Thus, if a plea agreement is held to be part of the record considered by an appellate court conducting plain-error review of a claim of Rule 11 error, respondent will not be able to show that he would not have pleaded guilty if the district court had provided the omitted information, because the plea agreement demonstrates that respondent was aware of it. For the same reason, respondent will not be able to satisfy the Ninth Circuit's standard, which requires a showing that "he did not understand the rights at issue when he entered his guilty plea." App., *infra*, 5a.

C. The Questions Presented In This Case Have Recurring Importance To The Administration Of The Criminal Justice System

As this Court has recognized, the criminal justice system depends on guilty pleas in general and plea bargaining in particular. See, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 632 (2002) (Government places "heavy reliance upon plea bargaining in a vast number * * * of federal criminal cases"); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."); *Santobello* v.

New York, 404 U.S. 257, 260 (1971) (plea bargaining is "an essential component of the administration of justice"). In the 12-month period ending September 30, 2002, for example, more than 95% of the nearly 71,000 convictions in federal court were obtained by guilty plea, and more than 85% of the nearly 79,000 criminal defendants in the federal system had their cases resolved through guilty pleas. Administrative Office of the U.S. Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts* 221-224 (Table D-7). A plurality of those cases arose in the Ninth Circuit, where 22% of federal criminal defendants were prosecuted and 22% of defendants who pleaded guilty entered their pleas. *Ibid.* A substantial proportion of guilty pleas in federal criminal cases, moreover, are entered pursuant to written plea agreements.

Rule 11 applies in every case in which a defendant pleads guilty in federal court. The enactment of that rule, and its evolution over the years from "general scheme to detailed plan," *Vonn*, 535 U.S. at 62, represent important steps towards standardizing the plea process and ensuring that guilty pleas satisfy constitutional standards. It is regrettably the case, however, that district courts sometimes neglect to provide all of the advice required by Rule 11. It is also the case that defense counsel often fail to object to a district court's omission. There are a great many cases, therefore, in which a claim of Rule 11 error can potentially be raised for the first time on appeal, and a large proportion of such cases arise in the Ninth Circuit. The holdings at issue here, one of which permits an appellate court to overturn a guilty plea based on a forfeited claim of Rule 11 error even when the defendant would have pleaded guilty had there been no error, and the other of which prohibits the court from considering a plea agreement

that fully and accurately states the omitted Rule 11 advice in determining whether the defendant was aware of it, will likely affect the outcome in a substantial number of these cases. The court of appeals' holdings warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-50181

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

Argued and Submitted: Dec. 5, 2001
Filed: Nov. 25, 2002

Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

JAMES R. BROWNING, Circuit Judge.

Appellant Carlos Dominguez Benitez ("Benitez") appeals his conviction, entered upon a plea of guilty, and his 120 month sentence for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. § 846. Benitez contends his conviction must be reversed because the district court failed to comply with Fed. R. Crim. P. 11(e)(2) by not informing him he could not withdraw his guilty plea if the court did not accept the sentencing recommendation set forth in the plea agreement. We agree and reverse.

I.

On May 28, 1999, Benitez was charged with conspiracy to possess with intent to distribute and possession with intent to distribute more than 500 grams of methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1). Benitez entered into a written type (B) plea agreement with the government in which he agreed to plead guilty to the charge of conspiracy to possess with intent to distribute. This charge carried a base offense level of 32. However, the government stipulated to a two-level downward adjustment for the safety valve provision[1] and a three-level downward adjustment for acceptance of responsibility, resulting in an offense level of 27 and a Guideline range of 87 to 108 months.[2] The parties expected Benitez to qualify for the safety valve provision.[3] The plea agreement stated that

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[1] The safety valve provision states a court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory mandatory minimum if the defendant meets five criteria: (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon; (3) the offense did not result in death or serious bodily injury; (4) the defendant was not the organizer, leader, manager or supervisor of others and was not engaged in a continuing criminal enterprise; and (5) the defendant has truthfully provided the government all information the defendant has concerning the offense(s) that were part of the same course of conduct. *See* U.S.S.G. § 5C1.2 (1998).

[2] The government also agreed to recommend a sentence at the low-end of the Guideline range provided the court calculated Benitez's offense level as 27 or higher.

[3] In the plea agreement, the parties stipulated that Benitez satisfied safety valve provision criteria two through four as set forth in Sentencing Guideline § 5C1.2. Because the presentence report had not been completed, the parties had no agreement

Benitez could not withdraw his guilty plea if the district court did not accept the recommended sentence.

At the change of plea hearing, Benitez testified that the agreement had been read to him in Spanish, his native language, that he discussed the agreement with his counsel, and that he understood the agreement. The record, however, reveals that Benitez complained to the court that he lacked communication with his counsel before the change of plea hearing and that he renewed his complaint several times before sentencing. Additionally, Benitez told the court at sentencing that he did not understand the applicable sentencing guidelines or safety valve provision.

At the change of plea hearing, the district court advised Benitez that the court was not a party to the plea agreement, that the plea agreement was not binding on the court, and that Benitez would be sentenced to the mandatory minimum, 120 months, if he was ineligible for the safety valve provision. However, the court failed to inform Benitez he could not withdraw his guilty plea if the court did not accept the recommendation set forth in the plea agreement. The court questioned Benitez's counsel and the prosecutor regarding Benitez's eligibility for the safety valve provision and both said they believed Benitez would qualify.

The presentence report was issued January 31, 2000. The report stated Benitez had a criminal history category of III, rather than I, because he had two prior criminal convictions obtained under aliases. As a result, Benitez did not satisfy criteria one of the safety valve

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regarding criteria one, Benitez's criminal history category. The parties believe Benitez's criminal history category was I, which would qualify him for the safety valve provision.

provision and the court was required to impose the mandatory minimum sentence. The report recommended an offense level of 29, which corresponded to a Guideline range of 108 to 135 months. The mandatory minimum sentence was 120 months.

At the sentencing hearing, the prosecutor informed the court that "the government stands behind [the] plea agreement and its recommendations in every way, except we are precluded from going below [the mandatory minimum] because of the safety valve." Both parties recommended the court sentence Benitez to the mandatory minimum. The court accordingly sentenced Benitez to 120 months.

II.

Of the three types of plea agreements governed by Rule 11, only "type (B)" agreements prohibit the defendant from withdrawing his guilty plea if he fails to receive the sentence for which he bargained. For this reason, Fed. R. Crim. P. 11(e)(2) expressly requires that if a defendant enters into a type (B) agreement, the court "shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea." Because type (B) agreements embody such a high degree of risk to the defendant, the advisement required by Rule 11(e)(2) is of critical importance. In this case, it is undisputed that Benitez entered into a type (B) plea agreement, and that the district court in receivership to give the warning required by Rule 11(e)(2).

Because Benitez did not object to the district court's error at the change of plea hearing, we review for plain error. *United States v. Vonn*, 535 U.S. 55, 122 S. Ct.

1043, 1046, 152 L. Ed. 2d 90 (2002). We may reverse Benitez's guilty plea conviction if: (1) the district court erred, (2) the error was "plain," and (3) the error affected Benitez's "substantial rights." *See United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Even if these three conditions are met, we retain discretion and should not employ it to correct the district court's plain error unless it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

III.

There is no question that the district court erred. The district court's error was also plain. "Plain" error is error that is "clear" or "obvious." *Id.* at 734, 113 S. Ct. 1770. At the time of Benitez's change of plea hearing, our precedent clearly required courts to comply with Rule 11(e)(2). See, e.g., *United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994); *United States v. Graibe*, 946 F.2d 1428, 1435 (9th Cir. 1991).

To show the district court's plain error affected his substantial rights, Benitez must prove that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea. *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002). Benitez must satisfy both elements to meet his burden. *Id.*

Benitez has satisfied the first element. We have stated, "[t]he warning required by Rule 11(e)(2) provides an 'important safeguard' designed to ensure that the plea is 'intelligent' and 'knowing,' and the omission of such warning is neither 'minor' nor 'technical.'" *Graibe*, 946 F.2d at 1433.

We have since qualified this statement by concluding that if a court imposes the recommended sentence, its Rule 11 error is "merely technical" and does not require the sentence be set aside. *United States v. Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996). We based this conclusion on the underlying principle that a defendant's substantial rights are not compromised if he receives the sentence for which he bargained. *Id.* In this case, although the district court imposed the sentence urged by both parties at the sentencing hearing, the sentence was substantially higher than the one for which Benitez bargained. The district court's error, therefore, was neither "minor" nor "technical."

In order to satisfy the second element, Benitez must show he did not understand his rights when he entered his plea. *Minore*, 292 F.3d at 1118. The government argues Benitez cannot meet this burden because the written plea agreement included the Rule 11(e)(2) "warning." In support of its position, the government cites Benitez's testimony at the change of plea hearing that the agreement had been read to him in Spanish, he had discussed it with his attorney, and he understood it.

In *Kennell*, we rejected the same argument. We explained:

> Because there is a marked difference between being warned in open court by a district judge and reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of plea and arraignments, the reading of the plea agreement is not a substitute for rigid observance of Rule 11.

Kennell, 15 F.3d at 136; *see also United States v. Smith*, 60 F.3d 595, 598-599 (9th Cir. 1995).

The government's argument that the Supreme Court's decision in *Vonn* undercut this rule is unpersuasive. *Vonn* held that unless the defendant objects at the plea hearing, he must bear the burden of proving a Rule 11 error affected his substantial rights. 122 S. Ct. at 1046. *Vonn* also held that in assessing the effect of a Rule 11 error on a defendant's substantial rights, reviewing courts may consider the entire record, not just the change of plea transcript. *Id.* These rules need not inevitably lead to the conclusion that a defendant understood he could not withdraw his plea whenever the Rule 11(e)(2) "warning" is included in the written agreement. The *Kennell* court's concern with respect to the difference between a defendant reading boiler-plate language in an agreement and being advised of a fact in open court is no less valid after *Vonn*. If including the "warning" in the plea agreement were sufficient to inform a defendant he could not withdraw his guilty plea, Rule 11(e)(2) would have little force. *See United States v. Livorsi*, 180 F.3d 76, 81 (2d Cir. 1999) ("As the existence of Rule 11(e)(2) itself indicates, the best way to ensure that a defendant is fully aware of the implications of his decision to plead guilty is, after all, for the district judge to give the proper warning in open court").

In this case, the fact that the written plea agreement included the Rule 11(e)(2) "warning" does not establish that Benitez understood he could not withdraw his plea if the court did not sentence him according to its terms. The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine its provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for

the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the agreement.

The government also argues Benitez cannot show that he did not understand his rights because "the clear import" of statements made by the court show Benitez must have understood that he could not withdraw his guilty plea. The government points out that the court told Benitez he would receive a ten year sentence if he was ineligible for the safety valve provision, that the court was not a party to the plea agreement, and that there were no promises regarding the sentence he would receive, his criminal history category, or his eligibility for the safety valve provision.

We rejected a similar argument in *Graibe*. There we concluded that informing a defendant that a judge is not bound by the government's recommendation and has the discretion to impose a higher sentence "is simply not enough." *Graibe*, 946 F.2d at 1435. We stated:

> The proposition that the court is not bound by the Government's recommendations is distinct from the proposition that the defendant is bound if the court chooses not to follow the recommendation. Informing the defendant of the former does not relieve the court of its responsibility to inform him of the latter.

Id. at 1434 (*quoting United States v. Theron*, 849 F.2d 477, 481 (10th Cir. 1988)). *See also United States v. DeBusk*, 976 F.2d 300, 307 (6th Cir. 1992); *United States v. Iaquinta*, 719 F.2d 83, 85 (4th Cir. 1983).

Our recent decision in *Vonn* is clearly distinguishable from this case. In *Vonn*, although the district court failed to comply with Fed. R. Crim. P. 11(c) by not informing the defendant of his right to counsel during

the plea colloquy, the defendant was informed of the right both at his initial appearance and at his arraignment. *See United States v. Vonn*, 294 F.3d 1093, 1094 (9th Cir. 2002). *See also United States v. Siu Kuen Ma*, 290 F.3d 1002, 1005 (9th Cir. 2002) (finding no "plain error" where the district court violated Fed. R. Civ. P. 11(c)(6) by not informing the defendant of a provision in agreement waiving his right to appeal but the prosecutor summarized the terms of the plea, including the waiver provision, in open court). In this case, Benitez was never informed in open court that he could not withdraw his guilty plea if he failed to receive the benefit of his bargain and nothing in the record aside from the written plea agreement suggests he understood this fact.[4]

Benitez has met his burden of establishing that the district court's error was not merely technical and that he did not understand he could not withdraw his guilty plea if the court did not accept the sentencing recommendation in the plea agreement. Accordingly, the district court's failure to give the Rule 11(e)(2) "warning" affected Benitez's "substantial rights."

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[4] For the same reason, our recent decision in *United States v. Morales-Robles*, 309 F.3d 609 (9th Cir.2002) is inapposite to this case. In *Morales-Robles*, the defendant was not informed of his right to persist in his not guilty plea, but he was informed of his rights to a speedy and public trial and to call witnesses on his behalf. Because the right to plead not guilty is subsumed in the right to have a trial, we held that the failure to state specifically that the defendant was entitled to persist in his not guilty plea did not adversely affect his substantial rights. Here, by contrast, the court advised Benitez that it *was not bound* by the plea agreement, but never informed him that *he himself was bound.*

We should exercise our discretion to correct the error if a "miscarriage of justice would otherwise result." *United States v. Sayetsitty*, 107 F.3d 1405, 1413 (9th Cir. 1997). Benitez pled guilty with the expectation that the safety valve provision would apply and he would serve a sentence 12 to 33 months shorter than the sentence he received. The parties so stipulated in the written plea and Benitez's counsel and the prosecutor reinforced that expectation at the change of plea hearing. Although the court advised Benitez that it was not bound by the plea agreement, it failed to inform him he could not withdraw his guilty plea if he failed to receive the benefit of his bargain. Holding Benitez to his guilty plea when he was not fully aware of the consequences of the plea would constitute a miscarriage of justice. *See Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988) ("A plea of guilty is voluntary only if it is entered by one fully aware of the direct consequences of his plea").

IV.

Because the district court's failure to comply with Fed. R. Crim. P. 11(e)(2) constituted plain error which affected Benitez's substantial rights, and failure to correct the error would result in a miscarriage of justice, we reverse Benitez's conviction and remand to the district court for further proceedings consistent with this opinion and the accompanying memorandum disposition.

REVERSED and REMANDED.

TALLMAN, Circuit Judge, dissenting:

I respectfully disagree with the Court's analysis of the Rule 11(e)(2) issue now that the Supreme Court has decided *United States v. Vonn*, 535 U.S. 55, 122 S. Ct.

1043, 152 L. Ed. 2d 90 (2002). *Vonn* holds that when a defendant fails to object to a possible Rule 11 violation, the reviewing court must apply the plain error standard of review. Furthermore, *Vonn* instructs us to examine the record as a whole when conducting this review. Considering the cumulative effect of Benitez's signed plea agreement *and* the questions posed to Benitez during the plea colloquy, no plain error attends his conviction and sentence. We should affirm.

Vonn overrules prior Ninth Circuit cases like *United States v. Graibe*, 946 F.2d 1428 (9th Cir. 1991), which required us to find a Rule 11 violation if the transcript of the plea colloquy, when viewed by itself, did not provide proof that the defendant understood his fundamental rights that were waived by the plea agreement. *Graibe*, 946 F.2d at 1434. *Graibe* and its progeny, to which the Court's opinion tenaciously clings, held that a district court's failure to inform a defendant that he could not withdraw his guilty plea, even if the court later rejected the sentencing recommendation, was not harmless error where nothing in the plea proceeding suggested that the defendant understood the binding nature of his plea. *Id.* at 1434-35. *Graibe* prohibited our consideration of the contents of the written plea agreement when evaluating compliance with Rule 11. *Vonn* rejects this narrow and overly technical approach by placing the burden on the defendant to establish plain error, and by making it clear that our review is not limited to only the transcript of the plea proceedings. 122 S. Ct. at 1054-55.

In light of *Vonn*, I see no reason why we must cast a blind eye to the contents of the written plea agreement when determining whether Benitez had actual knowledge of the binding nature of his plea, especially where

the district judge orally reviewed the bulk of the plea agreement with Benitez during the plea colloquy. Benitez admitted to Judge Stotler that the agreement had been translated into Spanish and explained to him by his lawyer the day before he appeared in court to formally enter his plea. This was no hastily prepared document thrust upon the defendant moments before his court appearance.

After studying the transcript of the change-of-plea proceeding in its entirety, including the written plea agreement specifically reviewed by Judge Stotler with Benitez in the courtroom, I am satisfied that the district court's thorough and repeated warnings (coupled with Benitez's written acknowledgment after careful consultation with his lawyer) regarding his potential ten-year sentence provided adequate notice of the binding nature of his plea. The majority elevates form over substance by looking only to see if the "magic words" were spoken in the colloquy, while the Supreme Court tells us to apply the plain error rule to the record as a whole. This embodies a more reasonable approach in evaluating the cumulative effect of all of the warnings —written and oral—given to Benitez in connection with his plea. Together they conclusively show that Benitez understood the binding nature of his guilty plea.

In this case the district court made it abundantly clear to Benitez that he would receive a mandatory minimum sentence of ten years if he did not qualify for the safety valve exception. Benitez assured the court he understood that decision was the judge's alone. His written plea agreement acknowledges he was bound by the plea even if the probation officer's investigation later revealed that he could not qualify for a safety valve reduction because of his criminal past. His

statements in open court only have meaning if Benitez is understood to admit he knew he was bound by his plea. On the complete record, considered as a whole as *Vonn* dictates, I find no plain error and would affirm the sentence imposed.

Vonn holds "that a silent defendant [like Benitez] has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights." 122 S. Ct. at 1046. *Vonn* rejected the Ninth Circuit's overzealous standard which *Graibe, United States v. Kennell*, 15 F.3d 134 (9th Cir. 1994), and *United States v. Odedo*, 154 F.3d 937 (9th Cir. 1998), established. *Vonn*, 122 S. Ct. at 1047-48. The Supreme Court made clear that a defendant who remains silent shoulders "the burden to show that his 'substantial rights' were affected." *Id.* at 1048. Our Court once again falls into the same trap for which the Supreme Court criticized us in *Vonn*; the majority's approach is "more zealous than the policy behind [Rule 11] demands." *Id.* at 1054.

The majority's failure to follow binding precedent is not limited to just Supreme Court case law. *United States v. Morales-Robles*, 309 F.3d 609 (9th Cir. 2002), also controls the case before us. At issue in *Morales-Robles* was whether the district court violated Morales-Robles's substantial rights by failing to verbally advise him during his plea colloquy that he had a right to persist in his plea of not guilty. *Id.* at 610. We held that because "the district court informed [Morales-Robles] of the rights *associated* with his right to go to trial," such as his rights to a speedy trial, to call witnesses, and against self-incrimination, "the district court's failure to *specifically indicate* that he had the right to

persist in his plea of not guilty is not reversible under the plain error standard because it did not affect his substantial rights." *Id.* (emphasis added). In other words, the court's verbal statements on other topics necessarily implied the substance of the statement the district court failed to give. Similarly, while the district court here did not specifically indicate that Benitez could not withdraw his guilty plea, as shown below, it did make statements that necessarily imply the binding nature of his plea. The majority's holding today cannot be squared with *Morales-Robles*.

The majority assumes that Benitez's plea agreement was entered in haste just prior to the district judge assuming the bench to take his plea. The record shows otherwise. The ten-page plea agreement was the culmination of prior negotiations that led to the signing of an earlier version of the plea agreement on October 12, 1999. That document contained interlineations agreed between the parties, and initialed by Benitez, which were subsequently filed with the court on October 13 as an amended plea agreement. The defendant certified on the signature page:

> This agreement has been read to me in Spanish, the language I understand best, and I have carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement.

Unless the sentencing judge found that Benitez was eligible for a statutory safety valve reduction, paragraph 4 of the plea agreement states that Benitez faced a mandatory minimum sentence of ten years:

> Absent a determination by the Court that defendant's case satisfies the criteria set forth in 18 U.S.C. § 3553(f) and United States Sentencing Guideline § 5C1.2, the statutory mandatory minimum sentence that the Court must impose for a violation of Title 21, United States Code, Section 846, is ten years imprisonment followed by a five-year period of supervised release.

Additionally, paragraph 12 of the plea agreement reads:

> The stipulations in this agreement do not bind either the United States Probation Office or the Court. The Court will determine the facts and calculations relevant to sentencing.

Finally, paragraph 19 states:

> The Court is not a party to this agreement and need not accept any of the USAO's sentencing recommendations or the parties' stipulations. *Even if the Court ignores any sentencing recommendations, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea,* and defendant will remain bound to fulfill all defendant's obligations under this agreement. No one—not the prosecutor, defendant's attorney, or the Court—can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

(Emphasis added).

At the plea colloquy, the district judge reviewed the provisions of the written plea agreement, including discussing the substance of its provisions set forth above. She then inquired of the defendant:

> THE COURT: You are reminded that absent a determination by the Court that your case satisfies the criteria, which apparently would be a safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.
>
> Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?
>
> THE DEFENDANT: No.
>
> THE COURT: *So you realize the Court may give you a ten-year sentence or more, as provided for by law?*
>
> THE DEFENDANT: *Yes.*
>
> THE COURT: *Knowing that, do you still want to go forward with your guilty plea?*
>
> THE DEFENDANT: *Yes.*

> THE COURT: You must realize that the statutory maximum sentence provided for by law is actually as much as life imprisonment, a fine of up to $4 million, and a mandatory special assessment which is required, and that is in the sum of $100.
>
> Do you understand the maximum penalties provided for by law?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And knowing those consequences, do you still wish to go to forward with your guilty plea?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Mr. Wilke [defense counsel], is there some reason to believe that this defendant will in fact qualify for the safety valve calculation?
>
> MR. WILKE: Yes, your Honor, there is.
>
> THE COURT: *But you've told him that is still subject to the Court's determination?*
>
> MR. WILKE: *Yes, your Honor.*
>
> THE COURT: All right.

(Emphasis added).

The record shows that Judge Stotler spent substantial time insuring that Benitez entered into the plea knowingly and voluntarily, which satisfies the purpose of Rule 11. She specifically reminded him that any predictions as to whether or not he might be eligible for adjustments, including a safety valve reduction, were predictions regarding Benitez's sentence that were not

binding on the probation officer or the sentencing court when it came time to fix a proper sentence. She explained to him, "[T]hese stipulations are not binding on the Court. Do you understand that?" Benitez replied, "I do." Finally, Judge Stotler confirmed that defense counsel, Mr. Wilke, had discussed the Sentencing Guidelines with Benitez "very carefully."

The Court's conclusion that plain error invalidates this conviction ignores the role of conscientious defense counsel in negotiating pleas, and disregards the extensive supporting record before us by myopically focusing on a few missing words actually contained in writing but omitted orally in court. This approach places semantics over substance, and defies the Supreme Court. Because the Court's opinion disregards the analysis we now must follow under *Vonn* as well as our holding in *Morales-Robles*, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50181
D.C. No. CR-99-00067-AHS-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted: Dec. 5, 2001
Pasadena, California
Filed: Nov. 25, 2002

MEMORANDUM[1]

Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

The district court did not abuse its discretion by denying Appellant Carlos Dominguez Benitez's ("Benitez's") motions for substitute counsel. We consider three factors: (1) adequacy of the court's inquiry into

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

the complaint; (2) whether the conflict between the defendant and his attorney was so great that it resulted in total lack of communication preventing an adequate defense; and (3) the timeliness of the request. *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990).

The district court made an adequate inquiry into Benitez's complaint. It held a hearing, allowed Benitez to address the issue at the hearing and again at sentencing, and questioned his attorney, Wilke. The conflict between Benitez and Wilke did not lead to a complete breakdown in communication nor did it prevent Benitez from presenting an adequate defense. Although Benitez refused to speak to Wilke at one meeting, he did not continue to refuse to communicate. In his letters and statements to the court, Benitez never alleged Wilke was failing to investigate an entrapment defense. Benitez's last three "motions" were untimely since the issue left when they filed was his position regarding sentencing.

This court will not consider Benitez's claim of ineffective assistance of counsel on direct appeal because the record is not sufficiently developed to consider the issue. Benitez may petition for a writ of habeas corpus if there is evidence outside the record that would support his claim.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-50181
D.C. No. CR-99-00067-AHS-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

Argued and Submitted: Dec. 5, 2001
Decided: Jan. 29, 2002

Before BROWNING, REINHARDT, and RICHARD C. TALLMAN, Circuit Judges.

ORDER

Mandate shall be stayed pending the United States Supreme Court's decision in *United States v. Vonn*, 224 F.3d 1152 (9th Cir. 2000), *cert. granted*, 531 U.S. 1189, 121 S. Ct. 1185, 149 L. Ed. 2d 102 (Feb. 26, 2001) (No. 00-973).

MEMORANDUM[1]

The district court violated Federal Rule of Criminal Procedure 11(e)(2) by accepting Benitez's guilty plea without informing him he could not withdraw his plea if the court rejected the sentencing recommendation in the plea agreement. The dispositive issue is whether the district court's error was harmless.

A failure to comply strictly with Rule 11(e)(2) may be harmless if the record shows the defendant actually knew he would be bound by his plea regardless of the length of the sentence the court decided to impose. *United States v. Graibe*, 946 F.2d 1428, 1433 (9th Cir. 1991). However, even if a written plea agreement states the defendant cannot withdraw his plea, "the reading of the plea agreement is no substitute for the rigid observance of Rule 11." *United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994). Inclusion in the plea agreement of a statement that Benitez could not withdraw his plea does not establish Benitez's actual knowledge of that fact.

Nothing in the record of the plea proceeding suggests Benitez actually knew he could not withdraw his guilty plea. Since the district court imposed a sentence in excess of that recommended in the plea agreement, we hold the district court's failure to comply with Rule 11(e)(2) was not harmless error and Benitez's guilty plea must be vacated and the case remanded to district court to allow Benitez to enter a new plea.

The district court did not abuse its discretion by denying Benitez's motions for substitute counsel. We

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

consider three factors: (1) adequacy of the court's inquiry into the complaint; (2) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense; and (3) the timeliness of the request. *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990).

The district court made an adequate inquiry into Benitez's complaint. It held a hearing, allowed Benitez to address the issue at the hearing and again at sentencing, and questioned Wilke. The conflict between Benitez and Wilke did not lead to a complete breakdown in communication nor did it prevent Benitez from presenting an adequate defense. Although Benitez refused to speak to Wilke at one meeting, he did not continue to refuse to communicate. In his letters and statements to the court, Benitez never alleged Wilke was failing to investigate an entrapment defense. Benitez's last three "motions" were untimely since the only issue left when they were filed was his position regarding sentencing.

This court will not consider Benitez's claim of ineffective assistance of counsel on direct appeal because the record is not sufficiently developed for the court to examine the issue. Benitez may petition for a writ of habeas corpus if there is evidence outside the record that would support his claim.

REVERSED IN PART, AFFIRMED IN PART AND REMANDED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50181
D.C. No. CR-99-00067-AHS-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

May 6, 2003

ORDER

Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

Judge Browning and Judge Reinhardt have voted to deny the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc and Judge Browning so recommends. Judge Tallman has voted to grant the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

PLEA AGREEMENT FOR DEFENDANT DOMINGUEZ

1. This constitutes the plea agreement between Carlos Domiguez ("defendant") and the United States Attorney's Office for the Central District of California ("the USAO") in the above-captioned case. This agreement is limited to the USAO and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities.

PLEA

2. Defendant agrees to plead guilty to count one of the indictment in *United States v. Carlos Domiguez*, No. SA CR 99-67-AHS.

NATURE OF THE OFFENSE

3. In order for defendant to be guilty of count one, which charges a violation of Title 21, United States Code, Section 846, the following must be true: There was an agreement between two or more persons to posses with intent to distribute more than 500 grams of

a substance containing a detectable amount of methamphetamine and defendant became a member of the conspiracy knowing that its object was to posses methamphetamine with intent to distribute and intending to help accomplish that purpose. Defendant admits that defendant is, in fact, guilty of this offense as described in count one of the indictment.

PENALTIES

4. Absent a determination by the Court that defendant's case satisfies the criteria set forth in 18 U.S.C. § 3553(f) and United States Sentencing Guideline § 5C1.2, the statutory mandatory minimum sentence that the Court must impose for a violation of Title 21, United States Code, Section 846, is ten years imprisonment followed by a five-year period of supervised release. The statutory maximum sentence that the Court can impose for a violation of Title 21, United States Code, Section 846 is: life imprisonment; a fine of $4 million or twice the gross gain or gross loss resulting from the offense, whichever is greatest; and a mandatory special assessment of $ 100.

5. Supervised release is a period of time following imprisonment during which defendant will be subject to various restrictions and requirements. Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release, which could result in defendant serving a total term of imprisonment greater than the statutory maximum stated above.

FACTUAL BASIS

6. Defendant and the USAO agree and stipulate to the following statement of facts:

Defendant agreed to sell to a confidential informant methamphetamine for $5,800 per pound. Defendant obtained the methamphetamine from co-defendant Marcelino Gomez Benitez. On May 3, 1999, defendant, accompanied by Gomez Benitez and Esteban Barrera Martinez, met with the confidential informant and delivered to the informant approximately 1.3 kilograms of a substance containing methamphetamine. Defendant was to receive $200 for every pound of methamphetamine he sold to the informant. At the time of this transaction, defendant knew that he was selling methamphetamine and that methamphetamine is a controlled substance.

WAIVER OF CONSTITUTIONAL RIGHTS

7. By pleading guilty, defendant gives up the following rights:

a) The right to persist in a plea of not guilty.

b) The right to a speedy and public trial by jury.

c) The right to the assistance of counsel at trial, including, if defendant could not afford an attorney, the right to have the Court appoint one for defendant.

d) The right to presumed innocent and to have the burden of proof placed on the government to prove defendant guilty beyond a reasonable doubt.

e) The right to confront and cross-examine witnesses against defendant.

f) The right, if defendant wished, to testify on defendant's own behalf and present evidence in opposition to the charges, including the right to call witnesses and to subpoena those witnesses to testify.

g) The right not to be compelled to testify, and, if defendant chose not to testify or present evidence, to have that choice not be against defendant.

By pleading guilty, defendant also gives up any and all rights to pursue any affirmative defense, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could be filed.

SENTENCING FACTORS

8. Defendant understands that the Court is required to consider and apply the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") but may depart from those guidelines under some circumstances.

9. Defendant and the USAO agree and stipulate to the following applicable sentencing guidelines factors:

Base Offense Level	:	32 [U.S.S.G. § 2D1.1(a)]
Specific Offense Characteristics (Safety Valve)	:	-2 [U.S.S.G. § 2D1.1(b)(6)]
Adjustments (Acceptance of Responsibility)	:	-3 [U.S.S.G. § 3E1.1(a)(b)]

The USAO will agree to a downward adjustment for acceptance of responsibility only if the conditions set forth in paragraph 14 are met. The parties agree that no additional specific offense characteristics, adjustments, or departures apply. If, however, after signing this agreement but prior to sentencing, defendant were to commit an act, or the USAO were to discover a previously undiscovered act committed by defendant prior to signing this agreement, which act, in the judgment of the USAO, constituted obstruction of justice within the meaning of U.S.S.G. § 3C1.1, the USAO would be free to seek the enhancement set forth in that section.

10. The parties agree that:

a) Defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense charged in Count One.

b) The offense charged in Count One did not result in death or serious bodily injury to any person; and

c) Defendant was not an organizer, leader, manager, or supervisor of others in the offense charged in Count One and was not engaged in a continuing criminal enterprise.

11. There is no agreement as to defendant's criminal history or criminal history category.

12. The stipulation in this agreement do not bind either the United States Probation Office or the Court. The Court will determine the facts and calculations relevant to sentencing. Both defendant and the USAO are free to: (a) supplement the facts stipulated to in this agreement by supplying relevant information to the

United States Probation Office and the Court, (b) correct any and all factual misstatements relating to the calculation of the sentence, and (c) argue on appeal and collateral review that the Court's sentencing calculations are not error, although each party agrees to maintain its view that the calculations in paragraph 9 are consistent with the facts of this case.

DEFENDANT'S OBLIGATIONS

13. Defendant agrees:

a) To plead guilty as set forth in this agreement.

b) To abide by all sentencing stipulations contained in this agreement.

c) To appear as ordered for all court appearances, to surrender as ordered for service of sentence, to obey all conditions of any bond, and to obey all other court orders.

d) Not commit any crime.

e) To be truthful at all times with Pretrial Service, the U.S. Probation Office , and the Court.

f) To pay the applicable special assessment at or before the time of sentencing unless defendant lacks the ability to pay.

THE USAO'S OBLIGATIONS

14. If defendant complies fully with all defendant's obligations under this agreement, the USAO agrees:

a) To abide by all sentencing stipulations contained in this agreement.

b) At time of sentencing to move to dismiss the remaining counts of the indictment as against defendant. Defendant agrees, however, that at the time of

sentencing the Court may consider the dismissed count in determining the applicable Sentencing Guidelines range, where the sentence should fall within that range, and the propriety and extent of any departure from that range.

c) At the time of sentencing, provided that defendant demonstrates an acceptance of responsibility for the offense up to and including the time of sentencing, to recommend a two-level reduction in the applicable sentencing guideline offense level, pursuant to U.S.S.G. § 3E1.1, and an additional one-level reduction if available under that section.

d) To recommend that defendant be sentenced at the low end of the applicable Sentencing Guidelines range provided that the range as calculated by the Court is 27 or higher and provided that the Court does not depart downward in offense level or criminal history category.

BREACH OF AGREEMENT

15. If defendant, at any time between the execution of this agreement and defendant's surrender for service of defendant's sentence, knowingly violates or fails to perform any of defendant's obligations under this agreement, the USAO may declare this agreement breached. If the USAO declares this agreement breached, and the Court finds such a breach to have occurred, defendant will not be able to withdraw defendant's guilty plea, and the USAO will be relieved of all of its obligations under this agreement.

16. Following a breach of this agreement by defendant, should the USAO elect to pursue any charge that was either dismissed or not filed as a result of this agreement, then:

a) Defendant agrees that any prosecution not time-barred by the applicable statue of limitations as of the date of defendant's signing of this agreement may be initiated against defendant notwithstanding the expiration of the statute of limitations between the signing of this agreement and the commencement of any such prosecution.

b) Defendant gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or any speedy trial claim with respect to any such prosecution.

LIMITED MUTUAL WAIVER OF APPEAL

17. Defendant gives up the right to appeal any sentence imposed by the Court, and the manner in which the sentence is determined, provided that (a) the sentence is within the statutory maximum specified above, (b) the Court does not depart upward in offense level or criminal history category, and (c) the Court determines that the total offense level is 27 or below.

18. The USAO gives up its right to appeal the Court's Sentencing Guidelines calculations, provided that (a) the Court does not depart downward in offense level or criminal history category and (b) the Court determines, that the total offense level is 27 or above.

SCOPE OF AGREEMENT

19. The Court is not a party to this agreement and need not accept any of the USAO's sentencing recommendations or the parties' stipulations. Even if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the

maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea, and defendant will remain bound to fulfill all defendant's obligations under this agreement. No one—not the prosecutor, defendant's attorney, or the Court—can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

20. This agreement applies only to crimes committed by defendant, has no effect on any proceeding against defendant not expressly mentioned herein, and shall not preclude any past, present, or future forfeiture actions.

NO ADDITIONAL AGREEMENTS

21. Except as set forth herein, there are no promises, understandings or agreements between the USAO and defendant or defendant's counsel. Nor may any additional agreement, understanding or condition be entered into unless in a writing signed by all parties or on the record in court.

This agreement is effective upon signature by defendant and an Assistant United States Attorney.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALEJANDRO N. MAYORKAS
United States Attorney

[Signature illegible] _____ 10/12/99
CARMEN R. LUEGE — Date
Assistant United States Attorney

This agreement has been read to me in Spanish, the language I understand best, and I have carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. No promises or inducements have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

[Signature illegible] _____ 10-12-99
CARLOS DOMINGUEZ — Date
Defendant

I, Joe Hernandez, am fluent in written and spoken English and Spanish languages. I accurately translated this entire agreement from English into Spanish to defendant Carlos Dominguez on this date.

/s/ JOE HERNANDEZ 10-12-99
JOE HERNANDEZ — DATE
Interpreter

I am Carlos Dominguez's attorney. I carefully discussed every part of this agreement with my client. Further, I have fully advised my client of his/her rights, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this

agreement. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

/s/ CRAIG WILKE
CRAIG WILKE
Counsel for Defendant
Carlos Domiguez

10-12-99
Date

APPENDIX F

1. Fed R. Crim. P. 11 (1989):

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the

court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty

or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If

the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2. Fed. R. Crim. P. 52 (1944):

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

3. Fed. R. Crim. P. 11 (2002):

Rule 11. Pleas

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization

fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel —and if necessary have the court appoint counsel —at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea

agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea.

A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

4. Fed. R. Crim. P. 52 (2002):

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Supreme Court, U.S.
FILED
NOV 3 - 2003
OFFICE OF THE CLERK

No. 03-167

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CARLOS DOMINGUEZ BENITEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would have pleaded guilty if the violation had not occurred.

2. Whether, in deciding whether a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a court of appeals may consider the terms of a written plea agreement.

TABLE OF CONTENTS

	Page
Questions Presented	i
Brief in opposition to petition for a writ of certiorari ...	1
Opinions, memorandums, orders, and documents below	1
Statement of the case	1
Reasons for denying the writ	10
A. The Panel Correctly Focused On Whether Or Not The Respondent Understood The Consequences Of His Guilty Plea Rather Than Whether He Would Not Have Plead Guilty If Not For The Error In The Rule 11 Warning	11
B. The Panel Did Consider The Contents Of The Plea Agreement, Their Decision Is Not In Conflict With Any Inter-Circuit Decisions, Nor Of This Court, And Further Review Is Not, Therefore, Necessary To Secure Or Maintain Uniformity Of The Lower Court's Decisions	16
C. The Administration Of The Criminal Justice System	20
Conclusion	22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Addington v. Texas, 441 U.S. 418 (1979) 16

Drope v. Missouri, 420 U.S. 162 (1975) 16

Greenwood v. United States, 350 U.S. 366 (1956) 16

Jackson v. Indiana, 406 U.S. 715 (1972) 16

McCarthy v. United States, 394 U.S. 459 (1969) 21

Torrey v. Estelle, 842 F.2d 234 (9th Cir. 1988) 9

United States v. Benitez, 310 F.3d 1221 (9th Cir. 2002) ..... *passim*

United States v. Camacho, 233 F.3d 1308 (11th Cir. 2000) 14, 18

United States v. Chan, 97 F.3d 1582 (9th Cir. 1996) 7

United States v. Dixon, 308 F.3d 229 (3rd Cir. 2002) 13

United States v. General, 278 F.3d 387 (4th Cir. 2002) 14

United States v. Graibe, 946 F.2d 1428 (9th Cir. 1991) 7, 9, 13

United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) 14

United States v. Kennell, 15 F.3d 134 (9th Cir. 1994) ... 8, 13

United States v. Littlejohn, 224 F.3d 960 (9th Cir. 2000) 11, 12

United States v. Lyons, 53 F.3d 1321 (D.C. Cir. 1995) 15

United States v. Martinez, 277 F.3d 517 (4th Cir.), *cert. denied*, 123 S. Ct. 200 (2002) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Martinez, 289 F.3d 1023 (7th Cir. 2002) 14

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996) 18, 19

United States v. Minore, 292 F.3d 1109 (9th Cir. 2002) *cert. denied*, 123 S. Ct. 948 (2003) 6, 13

United States v. Morales-Robles, 309 F.3d 609 (9th Cir. 2002) 13

United States v. Noriega-Millan, 110 F.3d 162 (1st Cir. 1997) 15

United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) 6, 12

United States v. Prado, 204 F.3d 843 (8th Cir.), *cert. denied*, 531 U.S. 1042 (2000) 14

United States v. Ruiz, 536 U.S. 622 (2002) 20

United States v. Saxena, 229 F.3d 1 (1st Cir. 2000) 18

United States v. Vaughn, 7 F.3d 1533 (10th Cir. 1993) 14

United States v. Victoriano DeJesus Pena, 314 F.3d 1152 (9th Cir. January 9, 2003) 13

United States v. Vonn, 531 U.S. 1189 (2001) ..... *passim*

United States v. Westcott, 159 F.3d 107 (2d Cir. 1998) 14

FEDERAL STATUTES

Fed. R. Crim. P. 11 ..... *passim*

Fed. R. Crim. P. 11(c) 7

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Crim. P. Rule 11(c)(3)(B) 2

Fed. R. Crim. P. Rule 11(e)(2) ..... *passim*

Fed. R. Crim. P. 11(h) 5

Fed. R. Crim. P. 52 ..... *passim*

Fed. R. Crim. P. 52(b) 6, 12, 15, 17

21 U.S.C. sections 846 and 841(a)(1) 1

MISCELLANEOUS

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Carlos Dominguez Benitez (Respondent) respectfully submits that the petition for a writ of certiorari should be denied.

OPINIONS, MEMORANDUMS, ORDERS, AND DOCUMENTS BELOW

Respondent adopts and incorporates by reference all opinions, orders, memorandums, and documents below that are set forth in Appendices A through F to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent disagrees with the petitioner's statement of the case in a number of respects.

On May 28, 1999, the respondent and two co-defendants were charged with two counts of conspiracy to possess with intent to distribute, and possession with intent to distribute, more than 500 grams of methamphetamine, in violation of 21 U.S.C. sections 846 and 841(a)(1), respectively. Resp. C.A. ER Tabs 13. Trial was initially set for July 20, 1999; per stipulation of the parties, the court continued this date until October 19, 1999. Resp. C.A. ER Tab 13.

On September 10, 1999, the respondent filed a letter with the court requesting the appointment of new counsel and expressing his dissatisfaction with the pressure he

was under to sign a plea agreement. Resp. C.A. ER Tab 7 at 12.

On October 7, 1999, the court held a hearing at the respondent's request. At that hearing, the respondent explained to the court through a Spanish interpreter, that he was not "familiar with the Articles of the Constitution" and believed he was being treated "unfairly". Resp. C.A. ER Tab 5 at 6-7. The court noted that there was no communication between the respondent and his counsel. The government, too, characterized the case as being "paralyzed". Resp. C.A. ER Tab 5 at 10-11. Nevertheless, the court concluded that the respondent had competent counsel and did not see any grounds to remove his attorney. Resp. C.A. ER Tab 5 at 15.

On October 13, 1999, the respondent plead guilty pursuant to the plea agreement signed the previous day. Petition for Writ of Certiorari at 26(a). The Solicitor General intimates at page 7 of its petition that the district court conducted the Federal Rules of Criminal Procedure Rule 11 (Fed. R. Crim. P. 11) plea colloquy, with a written plea agreement exhibited to the court and the respondent. Neither is the case. The record is void of any actual reference to the plea agreement being present before the court or the parties at the change of plea hearing.

At the change of plea hearing, the district court gave an incomplete Rule 11(e)(2) warning that the respondent could not withdraw his guilty plea if the court did not follow the recommendations in the plea agreement[1]:

[1] The current version is found at Fed. R. Crim. P. Rule 11(c)(3)(B).

> THE COURT: Now then, in the next section of your plea agreement, there is a discussion about who is and is not a party to the plea agreement and the circumstances under which you may or may not be allowed to withdraw your guilty plea. I won't review that word by word, but I will go to paragraph 21. Resp. C.A.ER Tab 6 at 25.

The court concluded the change of plea hearing maintaining that the respondent's guilty plea was made, "freely and voluntarily" and that he "knowingly, intelligently, an voluntarily" waived his constitutional rights to go to trial. Resp. C.A. ER Tab 6 at 30.

On January 31, 2000, the respondent appeared before the court for sentencing. However, the respondent indicated that he was not prepared for sentencing, that he felt "railroading" into taking a plea, that he was still dissatisfied with his court appointed counsel, and that he had prepared a second letter for the court, stating, "I wanted to ask you for a new lawyer and when I had the chance to in court my lawyer whispered in my ear that I was not allowed to say anything to you or to speak openly with you" and "with me [sic] having a langue [sic] barrier I could not ask you if this were true. Resp. C.A. ER Tab 11 at 5-10.

On March 6, 2000, the respondent filed a third request for new counsel with the court, stating that his attorney made him "get into a state of depression." Resp. C.A. ER Tab 9 at 4.

At the March 13, 2003 sentencing hearing, the court gave the respondent the opportunity to speak on his own behalf. Once again, he expressed his dissatisfaction with his counsel stating that he never had any knowledge or

understanding about the points of responsibility, the safety valve or the laws, that he never hid anything from his attorney, and "really the crime that I committed, somebody sought me, I didn't look for the crime". Resp. C.A. ER Tab 13 at 9-10.

At sentencing, the district court asked the respondent what counsel could have been done differently in his case. The respondent replied: "[H]e should have explained to me from the beginning what is meant by the points, by the safety valve, by everything. . . . I never knew about that." *Id.* at 12. The district court confirmed that the respondent had disclosed his criminal history to his counsel before entering his guilty plea but nonetheless was advised that he would qualify for the safety valve adjustment. *Id.* at 11. The court adopted the guideline calculations set forth in its previous tentative ruling and the PSR. *Id.* at 20-21.

On appeal, the respondent raised a Fed. R. Crim. P. Rule 11(e)(2) error for the first time. He claimed that at the change of plea hearing the district court failed to give the proper Rule 11 warning that he could not withdraw his guilty plea if the sentencing recommendations set forth in his plea agreement were not adopted. In addition, the respondent raised an ineffective assistance of counsel issue. The Solicitor General misrepresents the respondent's third issue as challenging the district court's denial to substitute counsel. Petition for Certiorari at 10. Rather, the actual issue was whether the district court abused its discretion by not conducting a constitutionally adequate inquiry into respondent's motion for a substitution of attorney. Resp. C.A. Br. 21-37.

The government conceded that there had been a Rule 11(e)(2) error at change of plea hearing and agreed that under Ninth Circuit precedent the harmless error standard set forth in Fed. R. Crim. P. 11(h) prevailed. Nevertheless, the government declared in a footnote to its responsive brief that this Court had granted certiorari in *United States v. Vonn*, 531 U.S. 1189 (2001) on a decidedly similar issue which argued for a plain error standard of review. Gov't. C.A. Br. 17 n.2. The government proclaimed that the respondent could not prevail under "plain error" scrutiny due to the signed plea agreement. It reasoned that the respondent had been on Rule 11(e)(2) notice that he could not withdraw his guilty plea if the court did not adhere to the sentencing recommendations because the warning was contained in the written plea agreement. Petition for Writ of Certiorari at 34(a). Thus, argued the government, the respondent's substantial rights were not violated and plain error did not occur, even though the court failed to warn him of this consequence in open court.

On January 29, 2002, the Ninth Circuit panel issued an unpublished memorandum. The unanimous decision held that under prevailing Ninth Circuit precedent the district court had violated Rule 11(e)(2) and that the error was not harmless. Although the respondent's guilty plea was vacated and the case remanded to the district court to allow him to plead anew, acting *sua sponte*, the Court of Appeals agreed to stay the issuance of its mandate until this Court had decided *Vonn*. In the same memorandum, the court of appeals affirmed the lower court's denial to substitute counsel. *Id.* 21-23(a).

March 20, 2002, the Court of Appeals issued an order withdrawing its previous decision and required both parties to file supplemental briefs on the impact of *United*

States v. Vonn, 535 U.S. 55, which was decided by this Court, on March 4, 2002.

On November 25, 2002, a divided, Ninth Circuit panel issued its decision in a published opinion, *United States v. Benitez*, 310 F.3d 1221 (9th Cir. 2002) and once again vacated the respondent's guilty plea based on a Rule 11(e)(2) violation. *Id.* 1(a). The panel majority recognized that *Vonn* required a reviewing court to comply with Fed. R. Crim. P. Rule 52(b)'s "plain error" analysis when a Rule 11 argument is raised for the first time on appeal, and that the entire record became available for "consideration" to aid in that review. *Id.* at 7(a). In an unpublished memorandum filed the same day, the court of appeals was unanimous in affirming the constitutionality of the lower court's decision not to substitute attorneys and declined to review the claim of ineffective counsel. *Id.* 19(a).

The *Benitez* panel acknowledged that of the three types of plea agreements, the one the respondent entered into accorded such a "high degree of risk to the defendant" that the required Rule 11(e)(2) warning was of "critical importance". *Id.* at 4(a). Citing to this Court's plain-error test in, *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) the appeals court found that, "there was no question that the district court erred" and that that error was "plain". *Id.* at 5(a). Proceeding to the "substantial rights" prong of the "*Olano*" test, the court applied prevailing Ninth Circuit precedent, *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002), to determine if the error was "not minor or technical" and if the respondent "did not understand the rights at issue when he entered his guilty plea". *Id.* at 5(a). Under this two-prong test, the court of appeals found that the respondent had met both elements. *Id.* at 9(a).

Citing to *United States v. Graibe*, 946 F.2d 1428, 1433 (9th Cir. 1991), the panel majority reiterated the underlying constitutional principals embodied in Rule 11(e)(2) as an "important safeguard designed to ensure that the plea is 'intelligent' and knowing". *Id.* at 5(a). The court noted that *United States v. Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996) 'qualified' *Graibe* in determining that when a defendant obtains the sentence he bargained for then the Rule 11 error was "merely technical" and would not be "set aside". Since the respondent received a substantially higher sentence than the one he bargained for, the panel majority concluded that the district court's error was "neither minor nor technical". *Id.* at 6(a).

Contrary to the Solicitor General's assertions, the panel majority *did* consider that a signed plea agreement might evidence understanding of an omitted Rule 11 warning. However, the court of appeals declined to follow the government's reasoning that inclusion of the omitted warning in the respondent's plea agreement *conclusively* showed that he was aware of Rule 11(e)(2). The panel majority distinguished the respondent's case from that of the defendant in *Vonn*. In *Vonn*, the district court failed to fully comply with the Fed. R. Crim. P. 11(c) requirement to inform the defendant of his right to counsel. Nevertheless, Vonn was twice informed of this right in open court – at his initial appearance and at his arraignment. However, the respondent's situation was decidedly distinct in that he was *never* informed in open court of the omitted warning. *Id.* at 9(a).

In this case, the court of appeals found that the written plea agreement did not "establish" that the respondent understood that he could not withdraw his guilty plea if he did not get the sentence that was recommended.

Id. at 7(a). The court relied on, *United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994) for the proposition that "boiler plate language" in a plea agreement is no "substitute for the rigid observance of Rule 11". *Id.* at 6(a).

Furthermore, the panel majority considered other factors that the Solicitor General neglected to include in the petition: 1) the plea agreement was read to the respondent by a Spanish interpreter and that he then signed a plea statement written in English, which is not his native language. Petition for Writ of Certiorari at 7(a). 2) both defense counsel and the prosecutor had ensured the respondent, prior to him signing the plea agreement, that he would receive the "safety valve" adjustment and the district court's colloquy stated that safety valve consideration "remains a possibility, apparently a strong one". *Id.* at 10(a); Resp. C.A. ER Tab 6 at p. 3; 19) the district court made a finding of fact that the respondent had disclosed his criminal history to his counsel before entering his guilty plea but nonetheless was advised that he would qualify for the safety valve adjustment. *Id.* at 10(a); Resp. C.A. ER Tab 13 at 11; and 4) although the district court engaged in a discussion, it never explained to the defendant that the safety valve was directly related to prior convictions. Resp. C.A. ER Tab 6 at p. 19.

This factual foundation caused the panel majority to conclude that:

> Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement. *Petition for Writ of Certiorari* at 7(a)-8(a).

Furthermore, the court was not persuaded by the government's reasoning that the omitted Rule 11(e)(2) language was somehow inextricably intertwined in the colloquy statement that a sentencing court was not bound by the parties recommendations in a plea agreement. For Ninth Circuit authority, the panel majority cited to *Graibe*. *Id.* at 8(a).

Based on the above delineated factors, the panel majority concluded that the respondent did not understand the consequences of his guilty plea due to not having received the Rule 11(e)(2) warning. Furthermore, the court recognized that the respondent was induced to sign the plea based on an expectation of receiving the safety valve and a much shorter sentence. Citing to prevailing Ninth Circuit precedent in, *Torrey v. Estelle*, 842 F. 2d 234, 235 (9th Cir. 1988), the court of appeals' panel held that to hold the respondent to his plea would be a "miscarriage of injustice". *Id.* at 10(a).

Judge Tallman was the dissenting voice on the Ninth Circuit panel. *Id.* at 10(a). Applying *Vonn* to the facts of this case, it was his opinion that the signed plea agreement, plus, the district court's colloquy proved that the respondent understood the omitted Rule 11 warning. The dissent focused exclusively on the state of the relevant record, rather, than on whether the respondent would have pled guilty if not for the omitted warning. *Id.* at 10(a)-18(a).

On January 23, 2003, the government filed its petition for rehearing en banc. In the petition, the government

asked the entire Ninth Circuit Court of Appeals to review the two-panel ruling on the very same issues now presented in the Solicitor General's petition for writ of certiorari. Government's Petition for Rehearing En Banc. On May 6, 2003, the Ninth Circuit issued its order denying the petition for rehearing en banc. *Id.* at 24(a).

REASONS FOR DENYING THE WRIT

The Solicitor General presents no matters meriting review by this court. None of the issues presented by petitioner raise an important federal question or present a circuit conflict, because in each instance the court of appeals correctly applied the controlling law. The Solicitor General's arguments simply dispute the application of that law to the peculiar facts of this case – claims not worthy of review by this Court.

The Solicitor General contends that the court of appeals erred in ruling that the respondent's substantial rights were violated when the court failed to give the proper Rule 11(e)(2) warning in open court. The petitioner argues that the language in the signed plea agreement correctly tracks the precise Rule 11 warning and that the wrong standard was used to recognize when a substantial right is violated. The court of appeals' decision, however, reflects a correct application of the principles of law discussed in this Court's opinion in *Vonn,* to the particular facts of this case. Indeed, the court of appeals did "consider" that the signed plea agreement contained the omitted advisement. Nevertheless, the panel majority determined that the plea agreement merely suggested,

rather, than definitively evidenced any "knowledge" or "understanding" on the part of the respondent.

The issues here are presented in the context of a unique factual situation that is not the appropriate subject matter for granting the writ, nor does the court of appeals' decision conflict with any decision of this Court, or of another court of appeals. Accordingly, the Petition for Writ of Certiorari should therefore be denied.

A. The Panel Correctly Focused On Whether Or Not The Respondent Understood The Consequences Of His Guilty Plea Rather Than Whether He Would Not Have Plead Guilty If Not For The Error In The Rule 11 Warning.

First, the Solicitor General argues that the panel majority improperly focused on the whether the respondent was aware of the omitted right rather than if he would have plead guilty if he was given the missing advisement. *Id.* at 15. Under this singular assessment, the defendant must show that he was prejudiced, and if not for the Rule 11 error he would not have pleaded guilty. Importantly, Justice Tallman's dissent does not take up this argument. Rather, the dissent focused solely on the issue of the definitiveness of the plea agreement, the Solicitor General's second question before this Court.

In *Benitez*, the panel majority correctly followed prevailing precedent as established in this Court, as well as, in the Ninth Circuit. *Benitez* correctly followed Rule 11 principles as stated in *Vonn*, "the rule meant to ensure that a guilty plea is knowing and voluntary." *Vonn*, 535 U.S. at 55. In addition, *Benitez* is consistent with *United States v. Littlejohn*, 224 F.3d 960 (9th Cir. 2000). However, when

citing to *Littlejohn*, the petitioner omits a crucial part of this Circuit's substantial rights test. The correct citation should also include, "[i]n the absence of a defendant's actual knowledge, we have previously refused to speculate as to whether a defendant's plea would have been different given such knowledge." *Id.* at 969. Although the *Littlejohn* court found the Rule 11 error harmless, it reached "this conclusion through more than just simple speculation". *Id.* at p. 970.

Benitez recognized that before proceeding to an examination of whether the defendant would not have pleaded guilty if not for the Rule 11 error, the reviewing court must make a threshold determination on whether or not the defendant understood the omitted advisement. *Vonn* established that it is the defendant who carries this burden of persuasion. The failure to meet the burden is because either the defendant admits that he knew or the court is able to look at the whole record and know, without speculation, that the defendant understood his rights.

The Solicitor General's principal argument rests on this Court's holding in *United States v. Olano*, 507 U.S. 725, 734 (1993). Pursuant to *Olano*'s general test for determining if a "plain error" violation had occurred, the error must be shown to have affected one's substantial rights. Petitioner contends that under a Fed. R. Crim. P. 52(b) analysis of a Rule 11 violation, the burden is on a silent defendant to show that the error was prejudicial; in that the error "affected the outcome of the proceedings". Citing to ten sister circuits, the Solicitor General declares that a Rule 11 error affects substantial rights only if the defendant would not have pleaded guilty had the error not occurred. Petition for Writ of Certiorari at 15.

The petitioner, following the dissent in *Benitez*, claims that the majority's reasoning relied on Ninth Circuit precedent overruled by *Vonn*. This contention proves incorrect when one looks to other Ninth Circuit cases deciding similar issues. In *United States v. Minore*, 292 F.3d 1109 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 948 (2003), the Ninth Circuit recognized the continuation of the Rule 11 pre-*Vonn* precedents to the extent that they do not conflict with this Court's ruling. Indeed, this Court's recent refusal to grant certiorari review in *Minore* attests to this fact.

The panel majority corrected distinguished *United States v. Morales-Robles*, 309 F.3d 609 (9th Cir. 2002). Moreover, the petitioner cites to cases in footnotes 9-10 of its petition approving the *Graibe* and *Kennell* decisions as authoritative, not overruled or undercut by this Court's decision in *Vonn*. (See, *United States v. Victoriano DeJesus Pena*, 314 F.3d 1152 (9th Cir. January 9, 2003).

The Solicitor General's reliance on out-of-circuit authorities proves equally misleading. Contrary to the petitioner's argument, *United States v. Dixon*, 308 F.3d 229, 234 (3rd Cir. 2002) cannot be so narrowly referenced. In *Dixon*, the Third Circuit stated, "the defendant must show that he was prejudiced by the error, i.e., *that he did not understand the consequences of his plea* ***OR*** that, if he had been properly advised about the effect of the special parole, he would not have pled guilty." (highlights not included). The Solicitor General's petition totally ignores this "understanding" prong.

The *Dixon* court looked to the appellate briefs to ascertain whether the defendant would have proceeded to trial if he had been properly warned. In the instant case,

the respondent's opening brief clearly outlines a possible entrapment defense. Resp. Opening Brief at 28. The possibility of raising a complete defense trumps the Solicitor General's assertion that the respondent was advantaged by taking a guilty plea in favor of the three-point reduction for acceptance of responsibility. Petition for Writ of Certiorari at 23. Prosecutorial incentives, such as the efficiency of the judicial system in handling more cases, the guarantee of convictions, the allocation of financial resources, and the information provided by co-operating defendants, can be just as attractive for the government to affect a guilty plea.[2]

In *United States v. Westcott*, 159 F.3d 107, 112 (2d Cir. 1998), the Second Circuit recognized that a Rule 11 "understanding" inquiry, "must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind." In *United States v. General*, 278 F.3d 387 (4th Cir. 2002), the Fourth Circuit required that the district court first ascertain what the defendant actually knows when he pleads guilty on the basis of an affirmative indication in the record". See *United States v. Camacho*, 233 F.3d 1308, 1322 (11th Cir. 2000); *United States v. Prado*, 204 F.3d 843, 846 (8th Cir.), *cert. denied*, 531 U.S. 1042 (2000); *United States v. Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993); *United States v. Johnson*, 1 F.3d 296, 302-304 (5th Cir. 1993); and *United States v. Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002).

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[2] Andrew Hessick and Reshman Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. Pub. L. 189, 191 (2002).

The Solicitor General's declaration that *Benitez* is contrary to decisions in other circuits proves to be flawed. The decisions cited in the petition are not in conflict, but rather distinguishable from this case. In some, the defendants simply could not meet their burden of persuasion, unlike the respondent who received a much higher sentence than anticipated by him, his counsel, and the government. See *United States v. Martinez*, 277 F.3d 517 (4th Cir.), *cert. denied*, 123 S. Ct. 200 (2002); *United States v. Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995).

Other out-of-circuit cases cited by the petitioner are merely distinguishable on their facts. In *United States v. Noriega-Millan*, 110 F.3d 162, 164 fn2 (1st Cir. 1997), "the transcript of the change-of-plea hearing indicated that Noriega-Millan had read and understood a Spanish version of his plea agreement and had some understanding of English." In the instant case, a Spanish version of the plea agreement was never provided to the defendant. Therefore, the panel majority correctly found that, "[s]ince Benitez was unable to read English, he had no opportunity to examine its provisions himself" and he had "little incentive to do so." Petition for Writ of Certiorari at 7(a).

The holding in *Benitez*, recognizes and accounts for the specific circumstances particular to this case. The Solicitor General attempts to downplay these factors. In so doing, a flawed Rule 52(b) prejudicial scrutiny is inserted. This analysis inclines to sacrifice the "open court" Rule 11 safeguards and weakens the constitutional standards of a "knowing, intelligent, and voluntary" plea of guilty. Comparisons with grand jury proceedings, detention hearings, trial, and sentencing proves inaccurate:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. *Drope v. Missouri* 420 U.S. 162 (1975)

In *Addington v. Texas*, 441 U.S. 418 (1979) this Court held that the government may detain mentally unstable individuals who present a danger to the public. See *Jackson v. Indiana*, 406 U.S. 715, 731-739 (1972); *Greenwood v. United States*, 350 U.S. 366 (1956).

The Solicitor General takes an isolated sentence from the substitution of counsel hearing where the respondent stated that he had not considered going to trial. The petitioner overlooks other statements made by the respondent to the district court. The record is clear that the respondent wanted to engage in further discussion with the court but was forbidden to do so by his defense attorney. Although defense counsel declared that his client did not intend to go to trial, the respondent's view is highly speculative since he was never allowed to fully express himself.

B. The Panel Did Consider The Contents Of The Plea Agreement, Their Decision Is Not In Conflict With Any Inter-Circuit Decisions, Nor Of This Court, And Further Review Is Not, Therefore, Necessary To Secure Or Maintain Uniformity Of The Lower Court's Decisions.

Secondly, the Solicitor General argues that the panel majority failed to consider the contents of the plea agreement in determining whether a Rule 11 violation is

reversible plain error. The petition maintains that the Ninth Circuit ruling is in direct conflict with this Court in *Vonn*, other Ninth Circuit decisions and sister circuits as well. Petition for Writ of Certiorari at 15. The petitioner presents no reason why this case should be reviewed. The panel majority correctly followed this Court and Ninth Circuit precedent when it concluded that under the particular circumstances of this case, a signed plea agreement without more, merely suggested that the respondent understood the omitted advisement.

The key legal question raised by the petitioner is whether the panel majority properly applied *Vonn* when it "failed to consider" the contents of the written plea agreement in its plain error analysis. In *Vonn*, this Court confirmed that there is a shift of burdens when one moves from a harmless error standard of review to that of plain error. Under the latter standard, a defendant who remained silent while a Rule 11 violation was occurring bears the burden on appeal to satisfy the plain error rule pursuant to Fed. R. Crim. P 52(b). *Id.* at 7(a).

At the outset, it is important to emphasize that under the facts of this case it seems somewhat misleading to identify a claim of a Rule 11 violation raised for the first time on appeal as a "forfeited" claim. Petition for Writ of Certiorari at 12. The respondent put the district court on notice that he had incompetent counsel prior to the change of plea proceeding. At the change of plea hearing, his concerns proved true. Nothing is lost or forfeited, rather, the burden shifts away from the government.

The conclusion that the panel majority failed to take into account the written plea agreement is predicated on a basic misreading of the *Benitez* opinion and applicable

precedent. The *Benitez* majority correctly followed Rule 11 principles, as articulated in *Vonn*, "the rule meant to ensure that a guilty plea is knowing and voluntary." The court reasoned that although the omitted Rule 11(e)(2) "warning" was contained in the written plea agreement, that language was "boiler-plate" and in English. The respondent, who spoke and read just Spanish, could communicate to the court only through an interpreter. *Id.* at 6(a).

The Solicitor General cites to out-of-circuit case law that are not in conflict with *Benitez*, but, merely distinguishable on their facts. In *United States v. Camacho,* 233 F.3d 1308, 1322 (11th Cir. 2000), the defendant got the "full benefit of the bargain" and could not bear the requisite burden regarding the ultimate sentence. In the instant case, the respondent met his burden because his sentence was not what he bargained for; rather he received a much higher sentence than anticipated by him, his counsel, and the government. In *United States v. Saxena*, 229 F.3d 1 (1st Cir. 2000), the First Circuit held that although the particular Rule 11 warning was not a part of the change of plea colloquy at a particular stage in that hearing, it was nevertheless given at a later time in the same proceeding. In this case, the respondent was never warned in open court, *at any time*, that he could not withdraw his guilty plea if the court did not abide by the sentencing recommendations.

United States v. McCarthy, 97 F.3d 1562, 1576 (8th Cir. 1996), is a pre-*Vonn* decision. The Eighth Circuit noted that the defendant had met with his attorney "30 or 40 times" and that they had "discussed the terms of the plea agreement on several occasions," the defendant spoke

English, was "a prominent local business man who possessed a master's degree in behavioral science," had done some doctoral work and was a "university certified chemical dependency counselor." Nor, and most importantly, did the *McCarthy* defendant ever evidence or claim any confusion or misunderstanding about the Rule 11 omission.

These facts are decidedly distinct from those in respondent's case. He clearly expressed confusion and misunderstanding. Respondent: 1) has little education; 2) can not speak or read English except through a Spanish interpreter and the plea agreement was presented to him in English; 3) early in the proceedings, requested a substitution of attorney because he could not communicate or get along with his appointed counselor; 4) told the district court he did not understand the laws and procedures of the United States; 5) wrote letters to the judge claiming he felt railroaded into taking his plea; and 6) petitioned the court for aid because procedures were not properly explained to him.

Contrary to the Solicitor General's assertions, the panel majority directly addressed and rejected petitioner's claim that the plea agreement by itself is sufficient to put the appellant on notice of the omitted Rule 11(e)(2) warning. After a full review of the record, the panel majority found that the signed plea agreement without an independent confirmation from a transcript was not conclusive but merely "suggestive" that the respondent might have understood the consequences of his guilty plea.

Reliance on a plea agreement written in English without more is insufficient to accord any understanding

to the respondent. The Solicitor General can offer no assurance that the Spanish translator correctly read the "no withdrawal of the guilty plea" language. For this type of assurance, the court needs a transcript of the translation of the Rule 11(e)(2) warning, and this is not in the record. For a more accurate type of assurance, the government should have provided a Spanish language plea agreement, which was not done in this case.

C. The Administration Of The Criminal Justice System.

> While the concept of convicting an innocent person is a terrible imperfection of our justice system; an innocent person pleading guilty is inexcusable.[3]

In its petition at page 28, the Solicitor General characterizes as "regrettable" that judges and defense counsels commit Rule 11 errors. However, these "regrettable" errors may manifest in the innocent being incarcerated. Despite concerns for wrongful convictions, the petitioner argues that the justice system depends on the occurrence of guilty pleas and the negotiation of plea agreements. To support this argument, the petitioner cites to this Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), and to statistics documented by the Department of Justice. However, *Ruiz* cannot be so narrowly quoted:

> And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual

[3] Hessick and Saujani, *Plea Bargaining*, supra Note 2 at 19.

> innocence of the defendant" regardless. **That fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11**, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy* v. *United States*, 394 U.S. 459, 465-467 (1969) (discussing Rule 11's role in protecting a defendant's constitutional rights). (highlights not included in original) (*Id.* at p.232)

The Department of Justice statistics do not reflect the frequency of wrongful convictions. As a result, the petitioner's data on federal convictions is suspect. To obtain this type of information, particularly those wrongful convictions based upon guilty pleas or negotiated plea agreements, one must look to the private sector. The collections compiled by either private institutions or private individuals are overwhelmingly concerned with state-based cases rather than federal prosecutions. However, there is no reason to think that instances of wrongful convictions occur any less in the federal judicial system.

As leading experts in the field of false confession research, Professors Richard Ofshe and Richard Leo state, "If it seems counter-intuitive that an innocent person would confess falsely, the specter of an innocent false confessor pleading guilty seems fantastic. Yet this is not uncommon."[4] Ofshe and Leo's collection of 60 wrongful

[4] Richard A. Leo and Richard J. Ofshe, *The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998).

conviction cases includes seven, or 12% having resulted from a guilty plea.

False confession experts, Professors Steven Drizin and Richard Leo, have assembled a collection of 125 cases of wrongful convictions. Fourteen or 11% of the 125 individuals in their study chose to plead guilty rather than face trial despite the fact that they were innocent.[5]

Following the Solicitor General's reasoning under a plain error review, there will be a relaxing of the constitutional standard for knowing, voluntary and intelligently made guilty pleas. If "speculation" and "suggestion" replace these judicial axioms, then the Rule 11 safeguards will be eroded and even more wrongful convictions will certainly occur.

CONCLUSION

The Ninth Circuit panel majority correctly found that respondent's substantial rights were violated when the district court failed to warn him that he could not withdraw his guilty plea if the court did not go along with the sentencing recommendations. This conclusion is correct. It is not contrary to any precedent of this Court and does not create an intra-circuit or inter-circuit split or raise any

[5] Steven A. Drizin & Richard A. Leo, *Police Induced Confessions in the Post-DNA Age*, 82 N.C. L. Rev. (forthcoming March 2004).

question of exceptional importance. The Petition for a Writ of Certiorari should be denied.

Dated: November 3, 2003

Respectfully submitted,

MYRA D. MOSSMAN, ESQ.

Supreme Court, U.S.
FILED
NOV 18 2003
OFFICE OF THE CLERK

(7)

No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
A. The Ninth Circuit's standard for determining whether a Rule 11 violation is reversible plain error conflicts with decisions of other courts of appeals	2
B. The Ninth Circuit's refusal to consider a plea agreement in deciding whether a Rule 11 violation is reversible plain error reflects a misinterpretation of this Court's decision in *Vonn* and conflicts with decisions of other courts of appeals	6

TABLE OF AUTHORITIES

Cases:

Blackledge v. *Allison*, 431 U.S. 63 (1977)	8
United States v. *Camacho*, 233 F.3d 1308 (11th Cir. 2000), cert. denied, 532 U.S. 951 (2001)	8, 9
United States v. *Cleary*, 46 F.3d 307 (3d Cir.), cert. denied, 516 U.S. 890 (1995)	3
United States v. *Diaz-Vargas*, 35 F.3d 1221 (7th Cir. 1994)	8
United States v. *Dixon*, 308 F.3d 229 (3d Cir. 2002)	2, 3, 4
United States v. *Edgar*, No. 02-6195, 2003 WL 22457041 (10th Cir. Oct. 30, 2003)	2
United States v. *General*, 278 F.3d (4th Cir.), cert. denied, 536 U.S. 950 (2002)	5
United States v. *Goins*, 51 F.3d 400 (4th Cir. 1995)	4
United States v. *Kennell*, 15 F.3d 134 (9th Cir. 1994)	6, 7
United States v. *McCarthy*, 97 F.3d 1562 (8th Cir. 1996), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997)	9
United States v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003)	5

Cases—Continued: Page

United States v. *Noriega-Millán*, 110 F.3d 162 (1st Cir. 1997) 4, 5
United States v. *Olano*, 507 U.S. 725 (1993) 1
United States v. *Pena*, 314 F.3d 1152 (9th Cir. 2003) 7
United States v. *Renaud*, 999 F.2d 622 (2d Cir. 1993) 3
United States v. *Saxena*, 229 F.3d 1 (1st Cir. 2000) 8, 9
United States v. *Smith*, 60 F.3d 595 (9th Cir. 1995) 7
United States v. *Vonn*, 535 U.S. 55 (2002) 2, 8
United States v. *Westcott*, 159 F.3d 107 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999) 3, 4, 5

In the Supreme Court of the United States

No. 03-167

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent provides no sufficient reason to leave either of the court of appeals' principal holdings unreviewed. The court of appeals held that a Rule 11 error affects a defendant's "substantial rights" if the error is neither minor nor technical and the defendant did not understand the right at issue when he entered his plea. The petition demonstrates that that holding is erroneous; is in considerable tension with this Court's holding in *United States* v. *Olano*, 507 U.S. 725, 734 (1993), that an error affects substantial rights if it "affect[s] the outcome of the district court proceedings"; conflicts with decisions of nine courts of appeals specifically holding that a Rule 11 error affects substantial rights if the defendant would not have pleaded guilty but for the error; and involves a question of recurring importance.

The court of appeals also held that, in deciding whether to grant relief for a violation of Rule 11 on plain-error review, a court may not consider a written plea agreement that accurately states the Rule 11 advice omitted by the district court. The petition demonstrates that that holding is

erroneous; misinterprets this Court's holding in *United States* v. *Vonn*, 535 U.S. 55, 59 (2002), that an appellate court addressing a claim of Rule 11 error may consider "the entire record"; conflicts with the decisions of six courts of appeals specifically holding that a court addressing such a claim may consider a plea agreement;[1] and involves a question of recurring importance.

Respondent does not seriously dispute that both of the court of appeals' holdings involve questions of recurring importance to the administration of the criminal justice system. He makes no genuine effort to defend the first holding or to reconcile it with *Olano*, and he is able to defend the second holding, and to reconcile it with *Vonn*, only by recharacterizing it. And his arguments that the holdings do not conflict with decisions of other courts of appeals are entirely without merit.

A. The Ninth Circuit's Standard For Determining Whether A Rule 11 Violation Is Reversible Plain Error Conflicts With Decisions Of Other Courts Of Appeals

Respondent contends that the court of appeals' standard for determining whether a plain error affects substantial rights is not "contrary to decisions in other circuits," and that the decisions cited by the government (Pet. 15) are "distinguishable from this case." Br. in Opp. 15. Respondent is mistaken. The court of appeals' decision squarely conflicts with decisions of nine other courts of appeals, including the First, Second, Third, and Fourth Circuit decisions that respondent singles out for special attention (*id.* at 13-15).

In *United States* v. *Dixon*, 308 F.3d 229 (2002), the Third Circuit held that a Rule 11 error did not affect substantial rights because the court was "not persuaded that but for the

[1] Since the petition was filed, a seventh court of appeals has so held. See *United States* v. *Edgar*, No. 02-6195, 2003 WL 22457041, at *3-*4 (10th Cir. Oct. 30, 2003).

error * * * , [the defendant's] choice to plead guilty would have been any different." *Id.* at 235. According to respondent, "[i]n *Dixon*, the Third Circuit stated, 'the defendant must show that he was prejudiced by the error, i.e., *that he did not understand the consequences of his plea* ***OR*** that, if he had been properly advised about the effect of the special parole, he would not have pled guilty.'" Br. in Opp. 13 (quoting 308 F.3d at 234). The italicized phrase, however, is no part of *Dixon*'s holding. The language quoted by respondent appears in a parenthetical to a case, *United States* v. *Cleary*, 46 F.3d 307 (3d Cir.), cert. denied, 516 U.S. 890 (1995), that is the last of four cited for the proposition that, to demonstrate an effect on substantial rights under the plain-error rule, a defendant "must show that he would have pled not guilty" if the Rule 11 error had not occurred. 308 F.3d at 234. And the only part of the parenthetical that is italicized by the Third Circuit is the last six words: *"he would not have pled guilty."* *Ibid.* *Cleary*, moreover, did not involve either the plain-error or the harmless-error rule.

In *United States* v. *Westcott*, 159 F.3d 107 (1998), cert. denied, 525 U.S. 1084 (1999), the Second Circuit held that a Rule 11 error did not affect substantial rights because "it cannot be said * * * that the * * * error * * * had any effect whatever on [the defendant's] decision to plead guilty." *Id.* at 113 (quoting *United States* v. *Renaud*, 999 F.2d 622, 625 (2d Cir. 1993)). According to respondent, *Westcott* "recognized that a Rule 11 'understanding' inquiry[] 'must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind.'" Br. in Opp. 14 (quoting 159 F.3d at 113). In fact, what the Second Circuit said must be resolved on the basis of the record is whether the Rule 11 error "prejudice[d] the defendant," and in the immediately following sentence, the court made clear that "prejudice," in this context, means that

the defendant "would have acted differently" if the Rule 11 error had not occurred. 159 F.3d at 113.

In *United States* v. *General*, 278 F.3d 389, cert. denied, 536 U.S. 950 (2002), the Fourth Circuit held that "the record does not reflect that any lack of understanding of the [omitted Rule 11 information] affected [the defendant's] decision to enter a guilty plea." *Id.* at 395. Respondent quotes the Fourth Circuit's statement in *General* that the district court must "first ascertain what the defendant actually knows when he pleads guilty." Br. in Opp. 14 (quoting 278 F.3d at 394). But he fails to quote its statement, two sentences later, that the ultimate question is whether providing the omitted Rule 11 advice "would have likely affected the defendant's decision" to plead guilty. 278 F.3d at 394 (quoting *United States* v. *Goins*, 51 F.3d 400, 402 (4th Cir. 1995)).

Finally, in *United States* v. *Noriega-Millán*, 110 F.3d 162 (1997), the First Circuit held that the very Rule 11 error at issue here did not affect substantial rights because it "did not affect [the defendant's] decision to plead guilty." *Id.* at 167. Respondent claims (Br. in Opp. 15) that *Noriega-Millán* is distinguishable because, in that case, there was a Spanish version of the plea agreement (see 110 F.3d at 164 n.2) and the defendant spoke some English (see *id.* at 164). But neither of those facts had anything to do with the First Circuit's holding that the defendant would have pleaded guilty even if there had been no Rule 11 error, and they certainly had nothing to do with its holding that a Rule 11 error does not affect substantial rights if the error had no effect on the defendant's decision to plead guilty. See *id.* at 167.[2]

[2] The fact that the court in each of these cases found no effect on the defendant's substantial rights despite his lack of knowledge of the information omitted from the Rule 11 colloquy demonstrates that there is a practical difference, not merely a difference in language, between the Ninth Circuit's approach and that of the majority of circuits. See *Dixon*, 308 F.3d at 235 (defendant would have pleaded guilty because he received substantial benefits in exchange for plea); *General*, 278 F.3d at 395 (defendant would have pleaded guilty even if he had not been aware of omitted Rule 11 information because he received substantial benefit in exchange for plea); *Westcott*, 159 F.3d at 112-113 (defendant would have pleaded guilty because he did not seek to withdraw plea when he learned of Rule 11 error shortly afterwards); *Noriega-Millán*, 110 F.3d 162 (defendant would have pleaded guilty even if he had been advised that district court's refusal to follow government's sentencing recommendation would not enable him to withdraw plea because he was advised that court was not obligated to follow recommendation and recommended sentence was only 11 months shorter than sentence imposed).

As part of his effort to reconcile the Ninth Circuit's decision with decisions of other courts, respondent also contends, without any citation of its opinion, that the court of appeals "recognized" in this case that, after making "a threshold determination on whether or not the defendant understood the omitted advisement," the court would proceed to "an examination of whether the defendant would not have pleaded guilty if not for the Rule 11 error." Br. in Opp. 12. That is incorrect. The court of appeals' decision does not say, or even suggest, that the question whether a defendant would have persisted in his plea of not guilty in the absence of a Rule 11 violation is relevant in deciding whether the violation amounts to reversible plain error. And the decision certainly does not undertake an "examination" of that question. The same is true of *United States* v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003), the case on which the court of appeals relied (Pet. App. 5a-6a). See 292 F.3d at 1118-1120.

B. The Ninth Circuit's Refusal To Consider A Plea Agreement In Deciding Whether A Rule 11 Violation Is Reversible Plain Error Reflects A Misinterpretation Of This Court's Decision In *Vonn* And Conflicts With Decisions Of Other Courts Of Appeals

1. Respondent contends that the Ninth Circuit does not, as a categorical matter, refuse to consider a plea agreement in deciding whether a Rule 11 violation requires vacatur of a plea. Br. in Opp. 17-18. He argues that the court of appeals held only that, "under the particular circumstances of this case" (*id.* at 17), the plea agreement's inclusion of the Rule 11 advice omitted from the plea colloquy does not establish that respondent was aware of the information in question. Respondent is mistaken.

In rejecting the government's argument that the plea agreement demonstrated respondent's awareness of the information omitted from the plea colloquy, the court of appeals (Pet. App. 6a-7a) followed its earlier decision in *United States* v. *Kennell*, 15 F.3d 134 (9th Cir. 1994). Quoting from that decision, the court said that, because of the "marked difference" between "being warned in open court by a district judge" and "reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of [the] plea," the fact that the defendant read the plea agreement "is not a substitute for rigid observance of Rule 11." Pet. App. 6a (quoting 15 F.3d at 136). The court also said that "[t]he *Kennell* court's concern * * * is no less valid after *Vonn*," because, if including the relevant warning in a plea agreement were sufficient, Rule 11 "would have little force." *Id.* at 7a. This reasoning reflects a categorical view that a plea agreement is not part of the record to be considered in a Rule 11 plain-error case.[3]

[3] Ninth Circuit decisions both before and after the decision in this case also interpret *Kennell* to impose a categorical bar on considering a plea agreement when deciding whether a Rule 11 violation is reversible error. See *United States* v. *Pena*, 314 F.3d 1152, 1157 (2003); *United States* v. *Smith*, 60 F.3d 595, 598-599 (1995).

It is true that the court of appeals went on to say that "[t]he plea agreement was in English and read to [respondent] by an interpreter," and that, "[s]ince [respondent] was unable to read English, he had no opportunity to examine its provisions himself." Pet. App. 7a. But given what the court said about plea agreements generally, there is no reason to believe that it would have reached a different conclusion if respondent had been able to read English. Indeed, the defendant in *Kennell*, whose guilty plea was also vacated despite a plea agreement that included the Rule 11 advice omitted from the plea colloquy, was apparently able to read English. See 15 F.3d at 135, 138.[4]

Even if the Ninth Circuit's rule were limited to cases in which the defendant does not read English, it would still be incorrect and there would still be a circuit conflict. When, as in this case (see Resp. C.A. E.R. Tab 6, at 6, 11-12), a defendant has acknowledged, under oath and in open court, that his plea agreement was read to him in his native language, that he carefully discussed the entire agreement with his attorney, and that he understands it, there is simply no basis for a presumption, much less a conclusive one, that the defendant did not know, or did not understand, what was in the agreement. That would be true in any case, since "[s]olemn declarations in open court carry a strong presump-

[4] In support of his contention that the court of appeals' refusal to consider the plea agreement was based on the particular circumstances of this case, respondent relies not only on the fact that he could not read English, but also on the fact that he had limited formal education and the fact that he made complaints about his lawyer. Br. in Opp. 19. But the court of appeals did not mention either of those facts, much less rely upon them, in holding that the plea agreement's inclusion of the omitted Rule 11 advice was irrelevant. See Pet. App. 6a-8a.

tion of verity." *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977). It is particularly true in a plain-error case, like this one, in which it is "the defendant who sat silent at trial" that has "the burden to show that his 'substantial rights' were affected." *Vonn*, 535 U.S. at 63. Indeed, in one of the cases cited in the petition (Pet. 26), the Seventh Circuit explicitly rejected the view that a defendant's "tenuous grasp of the English language" precludes reliance on a plea agreement that includes the Rule 11 advice omitted from the plea colloquy (in that case, the same advice that is at issue here), at least when the defendant "does not claim that he was unable to understand the interpreter or that the interpreter was incompetent." *United States* v. *Diaz-Vargas*, 35 F.3d 1221, 1225 (1994).[5]

2. Respondent also contends that the court of appeals decisions that the government cites for the proposition that a court may consider a plea agreement in deciding whether a Rule 11 violation constitutes reversible error (Pet. 26) are "not in conflict" with the decision in this case, but "merely distinguishable on their facts." Br. in Opp. 18. Respondent is mistaken. The court of appeals' decision squarely conflicts with decisions of seven other courts of appeals, including the First, Eighth, and Eleventh Circuit decisions to which respondent devotes particular attention (*ibid.*).

Respondent suggests that the Eleventh Circuit in *United States* v. *Camacho*, 233 F.3d 1308 (2000), cert. denied, 532 U.S. 951 (2001), and the First Circuit in *United States* v. *Saxena*, 229 F.3d 1 (2000), relied on something other than

[5] Respondent claims that the government is obligated to "offer [an] assurance that the Spanish translator correctly read the 'no withdrawal of the guilty plea' language." Br. in Opp. 20. This assertion overlooks both the interpreter's representation that he had "accurately translated th[e] entire agreement" (Pet. App. 35a) and the fact that it is respondent who bears the burden of proving that the Rule 11 error warrants reversal.

the plea agreement in finding that a Rule 11 error did not require vacatur of a guilty plea. Br. in Opp. 18. But the court in both cases relied on a number of facts, one of which was that the information omitted from the plea colloquy was included in the plea agreement. See *Camacho*, 233 F.3d at 1320-1322; *Saxena*, 229 F.3d at 8-9. Respondent also suggests that the Eighth Circuit relied on the plea agreement in *United States* v. *McCarthy*, 97 F.3d 1562 (1996), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997), solely because the defendant was a well-educated professional. Br. in Opp. 18-19. But the defendant's sophistication was only one of a number of reasons given by the court for rejecting the possibility that the defendant was "confused about the terms of the plea agreement" (*McCarthy*, 97 F.3d at 1576), and the other reasons—the clarity of the plea agreement and the defendant's acknowledgment, both in the agreement and at the plea colloquy, that he had read and understood it (*ibid.*)—are equally applicable here (see Pet. App. 33a-34a, 35a; Resp. C.A. E.R. Tab 6, at 11-12).

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2003

Supreme Court, U.S.
FILED
JAN 2 9 2004
OFFICE OF THE CLERK

(3)

No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUG. 4, 2003
CERTIORARI GRANTED: DEC. 8, 2003

TABLE OF CONTENTS

Docket entries, United States District Court for the Central District of California 1
Docket Entries, United States Court of Appeals for for the Ninth Circuit 19
Indictment (May 28, 1999) 35
Respondent's Letter to District Court (received Sept. 8, 1999) 39
Respondent's Application for Status Conference (Oct. 7, 1999) 42
Transcript of Status Conference (Oct. 7, 1999) 44
Transcript of Change of Plea Hearing (Oct. 13, 1999) 55
Respondent's Withdrawl of Request to Continue Sentencing, Position re: Sentencing and Personal Statement re: Sentencing (Jan. 26, 2000) 81
Transcript of Sentencing Hearing (Jan. 31, 2000) 90
Respondent's Letter to District Court (received Jan. 31, 2000) 96
Respondent's Letter to District Court (received Mar. 3, 2000) 100
Transcript of Sentencing Hearing (Mar. 13, 2000) ... 104
Judgment of Conviction (Mar. 21, 2000) 123

NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

Feb. R. Crim. P. 52 (1944) 42a
Feb. R. Crim. P. 11 (1989) 37a
Plea Agreement (Oct. 12, 1999) 26a

Table of Contents—Continued: Page

Initial Decision of Court of Appeals (Jan. 29, 2002) 21a
Subsequent Published Decision Court of Appeals (Nov. 25, 2002) 1a
Subsequent Unpublished Decision of Court of Appeals (Nov. 25, 2002) 19a
Fed. R. Crim. P. 11 (2002) 42a
Fed. R. Crim. P. 52 (2002) 47a
Decision of Court of Appeals Denying Rehearing (May 6, 2003) 24a

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
(SOUTHERN DIVISION)

No. 99-CR-67-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ BENITEZ, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/14/99	2	REPORT COMMENCING CRIMINAL ACTION as to Carlos Dominguez arrested on 5/13/99 Defendant's date of birth: 2/6/68. [8:99-m-171] (mt) [Entry date 05/20/99]
	* * * * *	
5/14/99	1	COMPLAINT filed against Carlos Dominguez, Marcelino Gomez Benitez, Esteban Barrera-Martinez in violation of 21:841(a)(1). Approved by Magistrate Judge Arthur Nakazato. [8:99-m-171] (mt) [Entry date 05/20/99]

DATE	DOCKET NUMBER	PROCEEDINGS
5/14/99	5	MINUTES OF ARRAIGNMENT ON MAGISTRATE COMPLAINT held before Magistrate Judge Arthur Nakazato as to Carlos Dominguez: Defendant arraigned and states true name as chrgd. First appearance of Carlos Dominguez entered. DFPD Attorney Craig M Wilke present. Bail set at detn. Govt req detn. Req granted. Court orders Carlos Dominguez detained. Defendant committed to the custody of the U. S. Marshal. Preliminary hearing set for 4:30pm on 5/28/99. Post indictment arraignment set for 8:30am on 6/1/99. Dft advised by govt of right to speak to Mexican consulate. Tape No.: SA99-14 [8:99-m-171] (mt) [Entry date 05/20/99] [Edit date 05/20/99]
5/14/99	—	SPANISH INTERPRETER required for Carlos Dominguez. [8:99-m-171] (mt) [Entry date 05/20/99]

DATE	DOCKET NUMBER	PROCEEDINGS
5/14/99	6	NOTICE DIRECTING Defendant To Appear for Preliminary Hearing and for Arraignment on Indictment/ Information filed as to Carlos Dominguez. [8:99-m-171] (mt) [Entry date 05/20/99]
5/14/99	7	NOTICE OF REQUEST FOR DETENTION filed by USA as to Carlos Dominguez. [8:99-m-171] (mt) [Entry date 05/20/99]
5/14/99	8	ORDER OF DETENTION by Magistrate Judge Arthur Nakazato as to Carlos Dominguez. (cc: all counsel) [8:99-m-171] (mt) [Entry date 05/20/99]
5/14/99	9	FINANCIAL AFFIDAVIT filed as to Carlos Dominguez [8:99-m-171] (mt) [Entry date 05/20/99]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/28/99	20	INDICTMENT filed against Carlos Dominguez (1) count(s) 1, 2, Marcelino Gomez-Benitez (2) count(s) 1, 2, Esteban Barrera-Martinez (3) count(s) 1, 2 filed by AUSA Gregory W
5/28/99	21	CASE SUMMARY filed by AUSA Leslie A Swain, attorney for USA, as to Carlos Dominguez. Defendant's date of birth: 2/6/68. (mt) [Entry date 06/10/99]
		* * * * *
5/28/99	24	MEMORANDUM filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez, Esteban Barrera-Martinez. This criminal action, being filed on 5/28/99, was not pending in the U.S. Attorney's Office before 11/2/92, the date on which U.S. District Judge Lourdes G. Baird began receiving criminal matters. (mt) [Entry date 06/10/99]

DATE	DOCKET NUMBER	PROCEEDINGS
5/28/99	25	MEMORANDUM filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez, Esteban Barrera-Martinez. This criminal action, being filed on 5/28/99, was not pending in the U.S. Attorney's Office before 12/22/98, the date on which U.S. District Judge Nora M. Manella began receiving criminal matters. (mt) [Entry date 06/10/99]
6/7/99	26	MINUTES OF POST-INDICTMENT ARRAIGNMENT HEARING held before Magistrate Judge Arthur Nakazato as to Carlos Dominguez, Marcelino Gomez Benitez, Esteban Barrera-Martinez: Dft Esteban Berrera-Martinez was not transported to crt. Randolph Driggs is present to appr spec for Diane Bass. PIA as to dft (3) is contd to 6/14/99 at 10:00am. Carlos Dominguez

DATE	DOCKET NUMBER	PROCEEDINGS
		(1) count(s) 1, 2, Marcelino Gomez Benitez (2) count(s) 1, 2 arraigned and states true name as chrgd. DFPD Attorney Craig Wilke, CJA Randolph Driggs present. Case assigned to Judge Alicemarie H Stotler. Plea not guilty entered by Carlos Dominguez (1) count(s) 1, 2, Marcelino Gomez Benitez (2) count(s) 1, 2. Jury trial set for 10:00am on 7/20/99. Dfts and cnsl are ord to appr. Trial estimate is 2 days. Tape No.: SA99-15 (mt) [Entry date 06/10/99]
6/7/99	27	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to Carlos Dominguez. (mt) [Entry date 06/10/99]
		* * * * *
7/20/99	31	STIPULATION AND ORDER filed by Judge Alicemarie H. Stotler as to Carlos Dominguez, Marcelino Gomez Benitez, Esteban Barrera-Martinez: Re cont of trial date

DATE	DOCKET NUMBER	PROCEEDINGS
		and excludable time periods under speedy trial act; findings; Jury trial contd to 10:00am on 10/19/99. (mt) [Entry date 07/21/99]
7/20/99	32	EXCLUDABLE DELAY FORM as to Carlos Dominguez, Marcelino Gomez Benitez, Esteban Barrera-Martinez (mt) [Entry date 07/21/99]
9/8/99	33	MINUTES OF IN CHAMBERS HEARING held before Judge Alicemarie H. Stotler as to Carlos Dominguez: Order for flg of dft's letter. C/R: n/a (mt) [Entry date 09/15/99]
9/10/99	34	LETTER filed as to Carlos Dominguez by dft (mt) [Entry date 09/15/99]
		* * * * *
10/7/99	36	EX PARTE APPLICATION filed by Carlos Dominguez for order setting status conference Lodged prop ord (mt) [Entry date 10/14/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/7/99	38	MINUTES OF STATUS CONFERENCE held before Judge Alicemarie H. Stotler as to Carlos Dominguez: Crt discussed w/dft his letter fld 9/8/99 & heard frm both cnsl. Dft's request for different cnsl denied. Trial date to remain. C/R: K Haaland (mt) [Entry date 10/19/99]
		* * * * *
10/7/99	40	ORDER filed by Judge Alicemarie H. Stotler as to Carlos Dominguez: granting ex parte application for order setting status conference [36-1]. (cc: all counsel) (mt) [Entry date 10/19/99]
10/12/99	41	PLEA AGREEMENT filed by USA as to Carlos Dominguez (mt) [Entry date 10/19/99]
10/12/99	42	EX PARTE APPLICATION filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez for order permitting release of grand jury transcript; memo of P&A; decl of cnsl. (mt) [Entry date 10/19/99]

DATE	DOCKET NUMBER	PROCEEDINGS
10/12/99	42	EX PARTE APPLICATION filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez for order permitting release of grand jury transcript; memo of P&A; decl of cnsl. (mt) [Entry date 10/19/99]
		* * * * *
10/13/99	45	PROPOSED VOIR DIRE QUESTIONS filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez (mt) [Entry date 10/19/99]
10/13/99	46	TRIAL MEMORANDUM filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez (mt) [Entry date 10/19/99]
10/13/99	47	PROPOSED JURY INSTRUCTIONS filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez (annotated set). (mt) [Entry date 10/19/99]
10/13/99	48	PROPOSED JURY INSTRUCTIONS filed by USA as to Carlos Dominguez, Marcelino Gomez Benitez (clean set). (mt) [Entry date 10/19/99]

DATE	DOCKET NUMBER	PROCEEDINGS
10/13/99	49	MINUTES OF CHANGE OF PLEA HEARING held before Judge Alicemarie H. Stotler as to Carlos Dominguez: Defendant moves to change plea to the Indictment. Plea of guilty entered by Carlos Dominguez (1) count(s) 1. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers dft to the Probation Office for investigation and report. Sentencing hearing set for 4:00pm on 1/31/2000. Trial dt of 10/19/99 vacated. Dft states T/N is CARLOS DOMINGUEZ BENITEZ. C/R: K Haaland (mt) [Entry date 10/19/99]
10/14/99	50	NOTICE OF DISCREPANCY AND ORDER by Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez Document ex parte appl; prop ord ordered filed and processed. (mt) [Entry date 10/19/99]

DATE	DOCKET NUMBER	PROCEEDINGS
10/14/99	51	ORDER filed by Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez, Marcelino Gomez Benitez: granting ex parte application for order permitting release of grand jury transcript [42-1] (cc: all counsel) (mt) [Entry date 10/19/99]
		* * * * *
10/14/99	57	AMENDED PLEA AGREEMENT filed by USA as to Carlos Dominguez Benitez (mt) [Entry date 10/19/99]
		* * * * *
1/26/00	62	WITHDRAWAL OF REQUEST TO CONTINUE SENTENCING, POSITION RE: SENTENCING & PERSONAL STATEMENT RE: SENTENCING filed by Carlos Dominguez Benitez (mt) [Entry date 02/07/00]

DATE	DOCKET NUMBER	PROCEEDINGS
1/27/00	63	POSITION RE: SENTENCING FACTORS filed by USA as to Carlos Dominguez Benitez (mt) [Entry date 02/08/00]
	* * * * *	
1/27/00	74	STIPULATION AND ORDER filed by Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez: to cont sentencing to 3/20/00 (mt) [Entry date 03/09/00]
1/31/00	65	MINUTES OF SENTENCING HEARING held before Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez: Purs to dft's request, matter is contd to 3/13/2000 at 3:30pm. C/R: K Haaland (mt) [Entry date 02/14/00]
	* * * * *	
2/2/00	68	MINUTES OF IN CHAMBERS before Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez: Order flg letter of dft. C/R: n/a (mt) [Entry date 02/17/00]

DATE	DOCKET NUMBER	PROCEEDINGS
2/2/00	69	LETTER filed as to Carlos Dominguez Benitez by dft (mt) [Entry date 02/17/00]
	* * * * *	
3/6/00	72	MINUTES OF IN CHAMBERS before Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez: Order that dft's letter to crt shll be filed & served on all cnsl of record. C/R: n/a (mt) [Entry date 03/09/00]
3/6/00	73	LETTER filed as to Carlos Dominguez Benitez by dft (mt) [Entry date 03/09/00]
3/13/00	77	MINUTES OF SENTENCING held before Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez (1) count(s) 1. Dft is sentenced to 120 months. Upon release from impris, placed on supvd release for 5 years under following T/C: Comply w/the r & r of the USPO and GO 318; Comply w/the r & r of the INS; All Fines are waived;

DATE	DOCKET NUMBER	PROCEEDINGS
		Pay $100 S/A, due immed. Crt recommends to BOP that dft be incarcerated in a CA institution. Purs to govt's motn, ct 2 is dism. Court advised of right to appeal. C/R: K Haaland (mt) [Entry date 03/27/00]
3/13/00	77	MINUTES OF SENTENCING held before Judge Alicemarie H. Stotler as to Carlos Dominguez Benitez (1) count(s) 1. Dft is sentenced to 120 months. Upon release from impris, placed on supvd release for 5 years under following T/C: Comply w/the r & r of the USPO and GO 318; Comply w/the r & r of the INS; All Fines are waived; Pay $100 S/A, due immed. Crt recommends to BOP that dft be incarcerated in a CA institution. Purs to govt's motn, ct 2 is dism. Court advised of right to appeal. C/R: K Haaland (mt) [Entry date 03/27/00]

DATE	DOCKET NUMBER	PROCEEDINGS
3/14/00	75	TRANSCRIPT DESIGNATION filed by Carlos Dominguez Benitez for transcript of 10/7/99, 10/13/99, 1/31/00 3/13/00, CR. K. Haaland; referencing. (fvap) [75-1] (app) [Entry date 03/15/00]
3/14/00	79	NOTICE OF APPEAL to USCA filed by Carlos Dominguez Benitez from sen minutes [77-4], filed on: 3/13/00 and entered on: 3/27/00. Fee status: Waived, DFPD; frms gvn TDO. (cc: Craig Wilke, DFPD; Carmen Luege, Miriam Krinsky; AUSA) (fvap) (app) [Entry date 03/30/00]
		* * * * *
3/21/00	78	JUDGMENT AND COMMITMENT issued to U.S. Marshal for Carlos Dominguez Benitez with Statement of Reasons Approved by Judge Alicemarie H. Stotler. Entered on: 3/27/00. (mt) [Entry date 03/27/00]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/3/00	80	ORDER FOR TIME SCHEDULE filed as to Carlos Dominguez Benitez for [79-1]. Transcript designation due: 4/20/00; CR transcripts due: 5/22/00; Appellant's briefs & excerpts due: 6/29/00; Appellee's reply brief due: 7/31/00; Appellant's reply brief due by: 8/14/00. (cc: all counsel) (wdc) (app) [Entry date 04/03/00]
	* * * * *	
4/12/00	82	NOTIFICATION by United States Court of Appeals as to Carlos Dominguez Benitez, designating USCA Appeal No. 00-50181 assigned to appeal [79-1]. (pjap) (app) [Entry date 04/12/00]
	* * * * *	
6/30/00	85	RECEIPT for Transcripts of proceedings held on: 10/7/99, 10/13/99, 1/31/00, 3/13/00 C/R: K Haaland (mt) [Entry date 07/05/00]

DATE	DOCKET NUMBER	PROCEEDINGS
6/30/00	—	TRANSCRIPT filed for proceedings held on 10/7/99 as to Carlos Dominguez Benitez. (mt) [Entry date 07/05/00]
6/30/00	—	TRANSCRIPT filed for proceedings held on 10/13/99 as to Carlos Dominguez Benitez. (mt) [Entry date 07/05/00]
6/30/00	—	TRANSCRIPT filed for proceedings held on 1/31/00 as to Carlos Dominguez Benitez. (mt) [Entry date 07/05/00]
6/30/00	—	TRANSCRIPT filed for proceedings held on 3/13/00 as to Carlos Dominguez Benitez. (mt) [Entry date 07/05/00]
7/20/00	86	CERTIFICATE of Record Transmitted to USCA-00-50181 re [79-1] (cc: all counsel) (wdc) (app) [Entry date 07/20/00]
	* * * * *	
11/15/00	89	TRANSCRIPT DESIGNATION filed by Carlos Dominguez Benitez for transcript of 10/7/99 CR: K. Haaland, referencing appeal [82-1] (USCA No.: 00-50181)(ghap) (app) [Entry date 11/15/00]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/29/02	92	RECORD ON APPEAL FORWARDED TO USCA 2 volumes original clerks file, 4 volumes C/R transcripts (00-50181) (pjap) [Entry date 03/29/02]
11/29/0	93	ORDER from USCA the govt's unopposed mot for an ext of time to file a petition for rehrg & suggestion for rehrg en banc is GR. The petition for rehrg & suggestion for rehrg en banc is due in the Clerk's office on or before 1/8/3. (00-50181) (weap) [Entry date 12/19/02]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50181

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ BENITEZ, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
4/5/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 4/3/00; setting schedule as follows: transcript shall be ordered by 4/20/00 for Carlos Dominguez Benitez; transcript shall be filed by 5/22/00; appellants' briefs, excerpts due by 6/29/00 for Carlos Dominguez Benitez; appellees' brief due 7/31/00 for USA; appellants' reply brief due by 8/14/00 for Carlos Dominguez Benitez. (RT required: y) (Sentence imp 120 months) [00-50181] (pg)
4/28/00	Rcvd notice of appearance of Emily S. Uhrig (Withdrew as counsel: attorney Craig Wilke for Carlos Dominguez Benitez [00-50181] (wp)

DATE	PROCEEDINGS
6/5/00	Filed notice of Appellant and deputy clerk order: (Deputy Clerk: LKK) The court is in receipt of appellant's notice of Court Reporter Kathy Haaland's default. (See Case file for complete text). Within 14 days from the entry of this order, Court Reporter Haaland shall either file the transcripts, file a motion for extension of time to do so, or inform the court in writing of any barriers to transcript production. (See case file for complete text) Appellant shall inform this court by letter within 28 days from entry of this order if the original transcripts have not been filed in the district court. In the absence of any further communication regarding an incomplete record, briefing shall proceed as follows: the opening brief is due July 31, 2000; the answering brief is due August 30, 2000, and the optional reply brief is due 14 days from service of the answering brief. This order shall be provided to the reporter at the district court; a copy of this order and appellant's motion shall be provided to Court Reporter Supervisor Dawn Bullock. (Motion recvd 5/30/00) [00-50181] (kc)

DATE	PROCEEDINGS
7/17/00	Filed Motion of Appellant and Order (Deputy Clerk: CB) The clerk is in receipt of aplt's notice of reporter default. The dc docket reflects that the transcripts were filed June 30, 2000. The briefing schedule is as follows: the opening brief and excerpts of record are due Aug 9, 2000, the answering brief is due Sept 8, 2000, and the optional reply brief is due 14 days from service of the answering brief. Aplt is reminded that a copy of all submissions to this court must be provided to opposing counsel; all submissions must include a statement that aplt has done so. (cite) A copy of the June 30, 2000 letter shall be provided to the Govt along with this order. (Motion recvd 7/3/00) [00-50181] (af)
7/21/00	Filed certificate of record on appeal RT filed in DC 6/30/00 [00-50181] (pg)
8/2/00	Filed motion of appellant and order (Dep. Clk./CB): Appellant's request to modify briefing is construed as a motion for an extension of time to file the opening brief and excerpts of record. So construed, the motion is granted. The briefing schedule is as follows: the opening brief and excerpts of record are due Sept. 20, 2000;

DATE	PROCEEDINGS
	the answering brief is due Oct. 20, 2000 and the optional reply brief is due 14 days from service of the answering brief. In view of the lengthy extension of time granted by way of this order, any further request for an extension of time to file this brief is disfavored. (Motion recvd 07/31/00) [00-50181] (je)
9/14/00	Filed Emily S. Uhrig's motion to withdraw as counsel under Cir. R. 4-1(c)(3). served on 9/12/00 MOATT (vt)
9/25/00	Received Appellant Carlos Dominguez Benitez's addendum exhibit) to attorney motion to withdraw counsel [3990750-1], served on 9/22/00 (MOATT) [00-50181] (ft)
10/10/00	Filed order (Appellate Commissioner) The motion of the FPD to withdraw as counsel for aplt is granted. Aplt's motion for appointment of csl is granted. Csl will be appointed by separate order. The clerk shall serve a copy of this order by fax on Maria Stratton who will locate appointed csl. New csl shall dsgn the RTs by 11/16/00. The RTs are due 12/18/00. The appellants' opening brief, excerpts due 1/29/01; appellees' brief due 2/28/01; the reply brief is due 14 days from the service of the answering brief. (MOTIONS) [00-50181] (wp)

DATE	PROCEEDINGS
10/22/00	Rec'd copy of DC order (CJA-20) filed on 10/10/00 appointing Myra Mossman as csl of record for aplt. [00-50181] (jr)
1/17/01	14 day oral extension by phone of time to file Appellant brief. [00-50181] appellants' brief due 2/12/01; appellees' brief due 3/14/01; optional reply brief due 14 days from service of answering brief (cb)
2/12/01	Filed original and 15 copies Appellant's opening brief (Informal: n) 38 pages and five excerpts of record in 1 volume; and 3 excerpts of record UNDER SEAL; served on 2/9/01. [00-50181] (je)
3/13/01	14 day oral extension by phone of time to file Appellee's brief. [00-50181] appellees' brief due 3/28/01; the optional reply brief is due 14 days from service of the answering brief. (cg)
3/30/01	Filed original and 15 copies appellee's 39 page brief, 0 excerpts of record; served on 3/28/01. [00-50181] (je)
3/30/01	Filed pre-sentencing report UNDER SEAL. [00-50181] (je)
4/13/01	Received Myra Mossman's, for Appellant Carlos Dominguez Benitez, letter dated 04/10/01. [MoATT] [00-50181] (je)

DATE	PROCEEDINGS
4/18/01	Received Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 04/15/01 re: correction to letter of 04/10/01. [MoATT] [00-50181] (je)
5/2/01	Filed order (Deputy Clerk: cb) Applt's letter motion to stay appellate proceedings is granted in part. Proceedings are stayed for 90 days from the date of this order. At or prior to expiration of the stay, defendant shall inform the court as to the status of the Supreme Court's review and shall, if appropriate, renew the request for supplemental briefing. If defendant fails to respond to this order in a timely fashion, the stay will be lifted without further notice. [00-50181] (je)
6/11/01	Filed Myra Mossman's CJA voucher and motion to allow filing of interim claim under CJA ; served on 5/16/01. (Commissioner) (dr)
7/31/01	Filed order (Appellate Commissioner) The motion of aplt's appt'd csl, Myra D. Mossman, for interim pymt under the CJA is GRANTED. The vch has been certified for one-half the amt. claimed for services, plus all amts claimed for expenses. The award is without prejudice to csl submitting a final vch claiming the

DATE	PROCEEDINGS
	remaining amt. Within 45 days after the final disposition of the case in this court or after the filing of a petition for a writ of cert., whichever is later, csl shall submit a final vch seeking reimbursement of expenses and pymt of any further compensation sought. See 9th Cir. R. 4-1(e). (served) [00-50181] (dr)
9/16/01	Calendar check performed [00-50181] (aw)
10/2/01	Calendar materials being prepared. [00-50181] [00-50181](aw)
10/9/01	CALENDARED: PASA Dec 5 2001 9:00 am Courtroom 1 [00-50181] (aw)
11/13/01	Rcvd original and 15 copies Applt's supplemental brief of 6 pages; served on 11/6/01 deficient: motion pending/Panel. [Faxed Panel] [00-50181] (je)
11/13/01	Rcvd Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 11/06/01 re: correction to page 36 of opening br. [RECORDS] [00-50181] (je)
11/15/01	Filed Applt's FAXED motion to file supplemental brief; served 11/15/01. [Faxed Panel] [00-50181] [00-50181] (je) [*sic*]
11/15/01	Filed Appellee's response opposing appellant's motion to file supplemental brief; served on 11/14/01. [Faxed Panel] [00-50181] (je)

DATE	PROCEEDINGS
11/19/01	Rcvd Myra Mossman for Appellant Carlos Dominguez Benitez FAXED ltr dated 11/17/01 re: error in mt filed 11/15/01. [Faxed Panel] [00-50181] (je)
11/19/01	Filed order (Deputy Clerk: pi) Defendant Benitez's Motion to File a Supplemental Brief is DENIED. (Served to Csls) [00-50181] (pi)
11/19/01	Filed HARDCOPY Applt's motion to file supplemental brief; served 11/15/01. [casefile] [00-50181] (je)
11/21/01	Rcvd HARDCOPY Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 11/17/01 re: error in mt filed 11/15/01. [casefile] [00-50181] (je)
11/23/01	Rcvd Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 11/21/01 re: clarification of 11/19/01 Ct. Order. [Faxed Panel] [00-50181] (je)
11/27/01	Received Faxed copy Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 11/27/01 re: enclosing new authority ltr br; proof of service and correction ltr. [Faxed Panel] [00-50181] (je)

DATE	PROCEEDINGS
11/29/01	Received Hardcopy Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 11/27/01 re: enclosing original correction ltr. [casefile/previously faxed Panel the faxed copy rcvd 11/27/0] [00-50181] (je)
11/29/01	Received Hardcopy Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 11/26/01 re: enclosing new authority ltr br; proof of service and correction ltr. [previously faxed Panel/ casefile] [00-50181] (je)
12/5/01	ARGUED AND SUBMITTED TO James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN [00-50181] (bg)
1/29/02	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): Mandate shall be stayed pending the United States Supreme Court's decision in United States v. Vonn, (cite). [00-50181] (je)
1/29/02	FILED MEMORANDUM DISPOSITION: REVERSED IN PART, AFFIRMED IN PART AND REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Unsigned, Unpublished. James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN) FILED AND ENTERED JUDGMENT. [00-50181] (je)

DATE	PROCEEDINGS
2/25/02	Filed Myra Mossman's motion to withdraw as counsel; served 02/19/02. [Panel] (je)
3/13/02	Rcvd Applt's consent statement re: supporting attorney motion to withdraw counsel; no service provided. [Panel] [00-50181] (je)
3/14/02	Filed USA motion to extend time to file petition for rehearing; served on 3/13/02. [Panel] (je)
3/19/02	Supplemental Criminal Justice Act voucher sent to Myra Mossman for Appellant Carlos Dominguez Benitez [00-50181] (dr)
3/20/02	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN) Carlos Dominguez Benitez's csl's mtn to withdraw made pursuant to Cir. R. 4.1(d) is DENIED. (PHONED OUT: 10:00 a.m.) [00-50181] (rc)
3/20/02	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN) the memorandum disposition filed 1/29/02, is WITHDRAWN. Each party shall file a supplemental brief by 4/12/02, addressing the effect of US v Vonn, U.S. 122 S.Ct. 1043 (2002) on this case. (PHONED OUT: 10:00 a.m.) [00-50181] (rc)

DATE	PROCEEDINGS
3/25/02	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN) Aple's mtn for an ext of time to file a petition for rehearing is DENIED. The mtn is premature because the parties have been ordered to file suppl briefs. (PHONED OUT: 12:40 p.m.) [4385534-1] [00-50181] (rc)
4/1/02	FILED CERTIFIED RECORD ON APPEAL: 2 CLERK'S RECORDS & 4 REPORTER'S TRANSCRIPTS. (ORIGINAL) [00-50181] (sd)
4/12/02	Filed original and 15 copies Appellant Carlos Dominguez Benitez supplemental brief of 8 pages, served on 4/10/02. [Panel] [00-50181] (je)
4/16/02	Filed original and 15 copies Appellee USA supplemental brief of 15 pages, served on 4/12/02. [Panel] [00-50181] (je)
11/4/02	Filed USA additional citations, served on 10/31/02. [Panel] [00-50181] (je)
11/25/02	MEMORANDUM OPINION FILED (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): AFFIRMED [00-50181] (je)
11/25/02	OPINION FILED (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): REVERSED and REMANDED. [00-50181] (je)

DATE	PROCEEDINGS
11/27/02	Filed motion and order (Deputy Clerk: cp) The Government's unopposed motion for extension of time to file petition for rehearing and rehearing en banc is granted. The petition and or rehearing en banc is due in the Clerk's office on or before 1/8/03. (Motion recvd 11/26/02) [00-50181] (ca)
12/24/02	Filed appellee's unopposed mtn for ex.tm.f pfr and pfr en banc; declaration of Elana Shavit Atrson; served 12/23/02. [author] (je)
12/31/02	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN,): Plntf-aple's motion for ext of time to file petition for rehearing and petition for rehearing en banc up to and including 1/22/03 is GRANTED. [4615802-1] [00-50181] [00-50181] (hh)
1/23/03	Filed original and 50 copies Appellee's petition for panel rehearing and petition for rehearing en banc in 19 pages; served 01/21/03. [Panel and All Active Judges] [00-50181] (je)
2/14/03	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN,): Aplt is directed to file a response to Aple's pet for rhrg and pet for rhrg en banc filed with this ct on 1/23/03.

DATE	PROCEEDINGS
	The response shall be filed w/i 21 days of the date of this order, and the aplt will provide this ct with 50 copies. [00-50181] (gail)
2/28/03	Filed Appellant Carlos Dominguez Benitez's unopposed motion to extend time to file petition for rehearing en banc; served 02/25/03. [author] [00-50181] (je)
3/4/03	Received Myra Mossman for Appellant Carlos Dominguez Benitez letter dated 03/03/03 re: duplicate mtn for ex.tm.f pfr; author has been served with original mtn; casefile] [00-50181] (je)
3/11/03	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): Defendant-Appellant's mtn for 14-day ex.tm.f response and opp to pfr and pfr en banc is granted. Defendant-Appellant's response is due on or before March 20, 2003. [00-50181] (je)
3/19/03	Filed Appellant Carlos Dominguez Benitez's response and opposition to Appellee's petition for rhrg en banc; in 15 pages; served 03/17/03. [Panel and All Active Judges] [00-50181] (je)

DATE	PROCEEDINGS
5/6/03	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): Judge Browing and Judge Reinhardt have voted to deny the pfr. Judge Reinhardt has voted to deny the pfr en banc and Judge Browning so recommends. Judge Tallman has voted to grant the petition for pnl rhrg and rhrg en banc. The full ct has been advised of the pfr en banc and no judge has requested a vote on whether to rhr the matter en banc. (cite) The petition for pnl rhrg and the petition for rhrg en banc are denied. [00-50181] (je)
5/12/03	Filed appellee's mtn to stay mdt pending consideration of filing petition for writ of cert; w/declaration; served 05/09/03. [author] (je)
5/16/03	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): Plaintiff-appellee's mtn to stay the mdt pending consideration of filing petition for writ of cert is GRANTED. The mdt shall be stayed until Aug. 11, 2003. [00-50181] (je)
5/16/03	Filed Appellant Carlos Dominguez Benitez response opposing appellee's motion to stay the mandate [4735318-1] served on 5/15/03. [author] [00-50181] (je)

DATE	PROCEEDINGS
5/20/03	Received Nancy Johnson's corrected proof of service for mtn to stay mandate; served 05/19/03. [author] [00-50181] (je)
5/23/03	Filed Applt's unopposed mtn for recon of the order to stay mdt pending consideration of filing of petition for writ of cert; served 05/21/03. [Panel] [00-50181] (je)
6/2/03	Filed order (James R. BROWNING, Stephen R. REINHARDT, Richard C. TALLMAN): Defendant-Appellant's "Motion for Reconsideration of the Order to Stay Mandate Pending Consideration of Filing Petition for Writ of Certiorari" is DENIED. [00-50181] (je)
8/5/03	Supplemental Criminal Justice Act voucher sent to Myra Mossman for Appellant Carlos Dominguez Benitez [00-50181] (dr)
8/8/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 03-167 filed on 08/04/03. [served Panel] [00-50181] (je)
8/15/03	Filed appellee's mtn to extend stay of mdt pending dispo of writ of cert; w/ declaration; served 08/14/03. [author] (je)

DATE	PROCEEDINGS
8/19/03	Filed order (James R. BROWNING): The govt's "Motion toExtend Stay of Mandate Pending Dispositon of Petition for Writ of Certiorari" is granted. The mandate shall be stayed until final dispo of this matter by the Supreme Ct. [00-50181] (je)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
February 1999 Grand Jury

SA CR 99-67 AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, MARCELINO GOMEZ-BENITEZ, AND ESTEBAN BARRERA-MARTINEZ, DEFENDANTS

INDICTMENT

[21 U.S.C. § 846: Conspiracy to Possess with Intent to Distribute Methamphetamine; 21 U.S.C. § 841(a)(1): Possession with Intent to Distribute Methamphetamine]

The Grand Jury charges :

COUNT ONE

[21 U.S.C. § 846]

A. OBJECT OF THE CONSPIRACY

Beginning on a date unknown and continuing to on or about May 12, 1999, in Orange County, within the Central District of California, and elsewhere, defendants CARLOS DOMINGUEZ ("DOMINGUEZ), MARCELINO GOMEZ-BENITEZ ("BENITEZ"), and ESTEBAN BARRERA-MARTINEZ ("MARTINEZ"), and others known and unknown to the Grand Jury , knowingly and

intentionally conspired and agreed with each other to possess with intent to distribute more than 500 grams of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

B. MEANS OF THE CONSPIRACY

The object of the conspiracy was to be accomplished in substance as follows:

1. Defendant DOMINGUEZ would arrange methamphetamine transactions with potential buyers.

2. Defendant BENITEZ would supply methamphetamine for the transactions.

3. Defendants DOMINGUEZ, BENITEZ, and MARTINEZ would deliver the methamphetamine to the buyer or their representatives.

C. OVERT ACTS

In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendants committed the following overt acts, among others, within the Central District of California and elsewhere:

1. On or about May 13, 1999, in a recorded telephone conversation, defendant DOMINGUEZ arranged to meet a confidential informant (the "CI") at a Norm's restaurant in Anaheim, California, for the purpose of selling the CI ten pounds of methamphetamine.

2. On or about May 13, 1999, defendant DOMINGUEZ met with the CI at the Norm's restaurant in Anaheim, California, and delivered a sample of methamphetamine.

3. On May 13, 1999, defendant DOMINGUEZ, BENITEZ, and MARTINEZ returned to the Norm's restaurant in a Toyota Tersel driven by defendant BENITEZ.

4. On or about May 13, 1999, defendants DOMINGUEZ and MARTINEZ gave the CI a bag containing approximately three pounds of a mixture or substance containing a detectable amount of methamphetamine.

COUNT TWO

[21 U.S.C. § 841(a) (1)]

On or about May 13, 1999, in Orange County, within the Central District of California, defendants CARLOS DOMINGUEZ, MARCELINO GOMEZ-BENITEZ, and ESTEBAN BARRERA-MARTINEZ knowingly and intentionally possessed with intent to distribute approximately 1,391 grams of a mixture or substance containing a detectable amount of methamphetamine, a schedule II controlled substance.

A TRUE BILL

_____

Foreperson

ALEJANDRO N. MAYORKAS
United States Attorney

GEORGE S. CARDONA
Assistant United States Attorney
Chief, Criminal Division

/s/ GREGORY W. JESSNER
GREGORY W. JESSNER
Assistant United States Attorney
Chief, Criminal Complaints

SHARON MCCASLIN
Assistant United States Attorney
Deputy Chief, Criminal Complaints

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CRIMINAL MINUTES - GENERAL

Case No.: SA CR 99-67 AHS Date: September 8, 1999

DOCKET ENTRY:

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]
Date: 9/10/99 DeputyClerk[signature illegible]

PRESENT: HON. ALICEMARIE H. STOTLER, JUDGE

Not Present	Not Present	Not Present
Deputy Clerk	Court Reporter	Asst. U.S. Atty.

U.S.A v. (DEFENDANTS LISTED BELOW)

(1) Carlos Dominguez
not present x custody __ bond

ATTORNEYS FOR DEFENDANTS

(1) Craig Wilke, DFPD
__ present x appointed

PROCEEDINGS:

(In Chambers) ORDER FOR FILING OF DEFENDANT'S LETTER

Defendant's letter to the Court received in chambers on September 8, 1999, is hereby ordered filed.

The Clerk is directed to serve this minute order and a copy of defendant's letter on all counsel of record. A copy of the minute order only shall be served on defendant at his last known place of incarceration.

[Received: Sept. 8, 1999]

Dear Honor, Alice Marie Stotler.

The reason I'm bothering you so, is because I Carlos Dominguez Benitez have as a lawyer Craig wilke and I want to express wth all respect that I feel very unsatified with the presentations Craig wilke has presented.

My intentions with no means of disrespect are to ask you if possible, you may issue me a new lawyer. I am uncomfortable with Mr. Wilke's decision of incouragement having me sign a deal that I do not feel appropriate.

Your Honor Alice Marie Stotler I have comitted a crime for which I am accepting responsibility but I ask of you to please reconcider my case to less time. I feel that the time I'm facing will distroy my life and my families life. I have four children in my family I support, and are paying the consequences.

Your Honor Alice Stotler with all respect at heart I close this letter with this only oportunity.

Sincerely,

Carlos Dominguez.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

[Filed: Oct. 7, 1999]

EX PARTE APPLICATION FOR ORDER SETTING STATUS CONFERENCE

Defendant CARLOS DOMINGUEZ, by and through his attorney of record, Deputy Federal Public Defender Craig Wilke, hereby applies for an order setting a status conference for Friday, October 8, 1999, at time convenient to the Court, or as soon thereafter as is convenient to the Court. This application is based on the attached declaration of Craig Wilke and the files and records in this case.

Respectfully Submitted,

MARIA E. STRATTON
Federal Public Defender

Dated: October 7, 1999

By: /s/ CRAIG WILKE
CRAIG WILKE
Deputy Federal
Public Defender

DECLARATION OF CRAIG WILKE

I, Craig Wilke, hereby state and declare the following:

1. I am a Deputy Federal Public Defender for the Central District of California. I have been appointed to represent Carlos Dominguez.

2. Mr. Dominguez is charged with conspiracy and possession with intent to distribute approximately 1.4 kilograms of methamphetamine. Trial is set for October 19, 1999.

3. Mr. Dominguez has previously asked the Court in writing to appoint a new attorney for him. On October 6, 1999, Mr. Dominguez declined to discuss his case with me and requested that he be allowed to speak to the Court directly.

4. On October 7, 1999, I advised Assistant United States Attorney Carmen Luege that I intended to request an immediate status conference. Ms. Luege had no objection to this request and stated that she was available on Friday, October 8, 1999, or Tuesday, October 12, 1999, at any time convenient to the Court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 7, 1999 /s/ CRAIG WILKE
CRAIG WILKE

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Santa Ana, California
Thursday, October 7, 1999

APPEARANCES

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[5]

THE CLERK: Item number 2, SA CR 99-67-AHS, United States of America vs. Carlos Dominguez.

Counsel, your appearances, please.

MS. LUEGE: Good afternoon, your Honor.

Carmen Luege on behalf of the United States.

THE COURT: Thank you.

MR. WILKE: Good afternoon, your Honor.

Craig Wilke on behalf of Carlos Dominguez who is present, in custody, and being assisted by a Spanish interpreter.

I apologize for the delay. I've been in Judge Edwards' courtroom.

THE INTERPRETER: Good afternoon, your Honor.

I'm Elisa Vasquez, Spanish interpreter.

THE COURT: Thank you.

This matter was added to the Court's calendar in an effort to accommodate the request of defense counsel with regard to permitting defendant to be heard directly.

The Court has reviewed the minute order of September 8th, which had attached to it the letter received from Mr. Carlos Dominguez. And that letter is before me now. And I assume it is in connection with that, as well as what Mr. Wilke has informed us, that brings the matter to [6] the Court today.

Mr. Dominguez, I invite you to make a statement to the Court if that continues to be your wish. I do want you to know that this is a public hearing, that you should be careful with respect to anything you discuss

with the Court that pertains to the charges against you or your confidential communications with your attorney.

As I review the letter that was submitted to us, you were concerned with a presentation made to you, and I can only draw certain inferences in connection with that particular statement. Please feel free, however, to make the statement, or statements, that you feel are necessary in connection with your case or representation, as you wish.

THE DEFENDANT: The only thing that I was looking for when I made that petition, more than anything I wanted you to look for an opportunity—

THE COURT: Excuse me. Could you move that microphone closer to the interpreter please, so we can hear from the interpreter.

Once again, please start.

THE DEFENDANT: What I was looking for, for the change of attorneys because I am not satisfied with the representation. I am not satisfied and I'm not happy with the representation, because I don't know, actually I'm not familiar with the Articles of the Constitution, but I believe I [7] have been treated unjustly.

The only thing that I am asking for is a better opportunity, a better deal. I have a family to support. The only thing I'm looking for is for a better deal.

THE COURT: A better deal sounds to me as though you are talking about a disposition of your case other than trial.

Is that what you are referring to?

THE DEFENDANT: Yes. At no time have I decided to go to any trial.

THE COURT: I want you to understand that it is entirely up to you whether you have a trial and entirely up to you to have an attorney represent you, either at trial or to negotiate the case short of a trial.

The Court can not be involved with any of your plea negotiations. As a matter of law, the judges of this court and every court are precluded from being involved. I may not, therefore, ask you questions about, quote, "a better deal." On the other hand, the Court needs to be concerned with the ability of you and your attorney to conduct this case—whether for trial or negotiations short of trial—in a professional, well informed manner.

What you are telling me so far is not pertaining to you and your attorney's ability to handle the case, either for trial or for disposition. I can infer from what [8] you wrote to me that whatever it was that your attorney presented to you was not acceptable to you.

This does not reflect badly on your attorney. It has everything to do with what the prosecutor may have discussed with your attorney and your attorney brought the matter, as he is required to do, to your attention for consideration.

Does this explanation make sense to you?

THE DEFENDANT: Yes.

The only thing that I also—in other words, we haven't been able to reach any agreement either.

THE COURT: "We," meaning whom?

THE DEFENDANT: With my attorney, my defender.

The communication that we have doesn't—our interaction, the way he exposes the case is not—in other words, I don't know how to explain it. It's too— it's too complicated.

THE COURT: Why don't you take a seat for a moment.

(The defendant complies.)

THE COURT: Criminal cases in the courtroom tend to be complicated. So I accept your statement in that regard. Nonetheless you must understand my concern with trying to find out discreetly, carefully, what it is that may be a problem, if there is any problem, between you and [9] your attorney.

Mr. Wilke, I know that puts you in a difficult position, but I feel the Court must call upon you for any insight that you feel you can fairly and safely offer consistent with your duties as a defender to this client.

MR. WILKE: Thank you, your Honor.

I think the only thing that I can offer, which I think I put in my application for today's hearing, was that as of yesterday Mr. Dominguez declined any further communications.

THE COURT: And this was obviously your calling on him at his place of incarceration?

MR. WILKE: That's correct, your Honor.

I did actually meet with him, but we had a brief, five-minute conversation and we tried to get into the substance of what was going on, and he declined to discuss it with me.

THE COURT: I see. Thank you.

So at this point, I have information that it is on your side of this discussion, Mr. Dominguez, that there is not communication. Before I hear from you again, if you wish to speak, let me ask the Assistant U.S. Attorney for any insight that she may be in a position to offer, again, consistent with her duties as the prosecutor in the case, to help the Court better understand the posture of the matter.

[10]

MS. LUEGE: From our perspective, from the government's perspective, the concern that we have is that we have a trial date coming up on October 19th, which is at this point less than two weeks away.

And we sort of have no movement in the case at all, either in terms of negotiations, in terms of a trial continuance, in terms of getting ready for a trial, because Mr. Wilke has expressed to me the problem he's having. So we're kind of in a situation where we can't resolve any matter. It's kind of like the case is paralyzed, which is a bad thing for the government since, from our perspective, we have to get ready for this trial, if nobody can tell me what is it that we're doing.

I can tell the Court that I spoke with Mr. Driggs who represents the other defendant in this case, and that Mr. Driggs is out of town and on vacation, but that he was interested in getting a continuance of the trial. And I had discussed that continuance with Mr. Wilke, and actually Mr. Wilke also had explained to me that he had a basis to ask for a continuance and needed a continuance of this trial.

We had checked with the clerk of the Court and had informally discussed December 14th as a trial date that accommodated the remaining parties. I had drafted a

stipulation to attempt to set a continuance of this case, I [11] had sent that to Mr. Driggs, who indeed signed the stipulation to continue the trial date.

And then it was in my pursuit of Mr. Wilke this morning saying, "I haven't heard from you," that it became clear that we sort of have the situation where the case is paralyzed because now one counsel wants a continuance, but this side of the table, it's kind of paralyzed because we can't move forward in any direction. And so, from my perspective, I sort of would like it to be resolved.

THE COURT: So as far as the government is concerned, the case can go to trial on October 19th, as scheduled?

MS. LUEGE: If we have to be ready, we will be ready, yes.

At this point, we're still—I'm sending out transcripts to be redone and I'm doing things, assuming that at this point it looks like we're going to trial. But, frankly, I would like a resolution.

The government has no objection to a continuance. And indeed, it appears from my conversation with both Mr. Wilke and Mr. Driggs that the defense is interested in a continuance. And I would have no objection to that.

THE COURT: And, of course, the Court has nothing before it now to suggest that anybody is asking for a continuance, albeit I accept counsel's representation that [12] such has been discussed and in fact something has been written down so as to reflect on the third defendant in this case.

I guess, I need to find out whether or not Mr. Wilke is of the frame of mind, knowing what he knows about the case and having met with a lack of communication, whether he's ready to try the case for Mr. Dominguez on October the 19th.

Before I turn back to him and Mr. Dominguez, is there anything else that government counsel cares to add?

MS. LUEGE: No, nothing else, your Honor.

THE COURT: All right.

MS. LUEGE: Thank you.

THE COURT: Maybe it would behoove us to hear from you, Mr. Wilke, on that score before I inquire of Mr. Dominguez, who is obviously receiving all of this information through the interpreter.

MR. WILKE: Your Honor, there is additional discovery that the Assistant United States Attorney has indicated would be provided prior to trial. We haven't received that yet. That would be the only thing holding me up and not being able to try the case.

However, Mr. Dominguez, as he has indicated here in court, doesn't want a trial. And I have represented that to Ms. Luege on several occasions.

[13]

So to the extent that the government somehow wouldn't be ready on the 19th, it would be largely based on representations by me to Ms. Luege. I've told her all along there won't be a trial on the 19th based on my client's representations that he doesn't want a trial.

And I do not have another trial set for that date, however, and I suppose if there would be a trial on that

date, I would be here and be ready to try it. Nobody seems to be asking for one, though.

THE COURT: I appreciate that.

And I think Mr. Dominguez needs to be told by the Court that there's nothing that the judge of the court can do with regard to making for happier, or better, or improved negotiations.

As I tried to explain at the outset, that is something that is off limits for the judges of the court. It is something that is up to you and your counsel, but significant responsibility in that regard rests with the prosecutor in the case. And whatever that person elects to offer is essentially what is presented, and there is not a great deal of choice.

What I am trying to say is that when there is a criminal charge, either there is a trial and the jury decides whether the accused person, yourself, is guilty or innocent, or there is some kind of negotiation short of [14] trial. I just need to make sure that you understand what the choices are.

But so far as I can discern, there is nothing inappropriate, unprofessional, incommunicative about the approach from your current appointed counsel. I have made the assumption that you're not in a position at this time to go out and hire your own counsel, and yet you want to have the assistance of counsel.

Since I am not in a position to identify anything amiss in your relationship and it is your choice not to speak to your attorney, I feel it is inappropriate for the Court to appoint a different lawyer to represent you. I am not seeing that there are currently grounds to somehow remove this attorney from representing you or handling your case.

In light of those observations, sir, I invite any additional information to be given to the Court that you feel should be conveyed.

THE DEFENDANT: Well, based on the information you have given me, I don't have anything else to add.

THE COURT: Very well then.

At this point, sir, what I intend to do is, have your case pend before the Court for a trial on October the 19th. This is not to say that you and your attorney may not consider and discuss with the prosecutor whether there [15] should be a resetting of this trial in light of further information to be provided to Mr. Wilke, and this is not to say that you won't be forced to a trial on October 19th.

Again, because there are other parties in this case, the Court is not in a position to resolve all of these issues. I am telling you today's present status. Obviously, it is entirely up to you as to whether or not you want the assistance of your attorney. But at this point, I must point out to you that having competent and capable representation, as you now have, is obviously in your best interest. I invite you to consider these thoughts as well while the matter continues to pend.

Unless the parties have anything additional for the Court to address today, we will go ahead and take our adjournment.

Mr. Wilke, anything else?

MR. WILKE: May I have just a moment, your Honor?

Nothing further, your Honor.

THE COURT: Ms. Luege?

MS. LUEGE: Nothing further, your Honor.

THE COURT: All right. That concludes proceedings for today.

We stand adjourned.

(Proceedings adjourned.)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Santa Ana, California
Wednesday, October 13, 1999

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[4]

THE CLERK: Calling item number 2, SA CR 99-67-AHS, United States vs. Carlos Dominguez.

Counsel, your appearances, please.

MS. LUEGE: Good afternoon, your Honor.

Carmen Luege on behalf of the United States.

THE COURT: Thank you.

MR. WILKE: Good afternoon, your Honor.

Craig Wilke on behalf of Carlos Dominguez who is present, in custody, and being assisted by a Spanish interpreter.

THE COURT: Thank you.

THE INTERPRETER: Good afternoon, your Honor.

Irma Lourdes Garcia, Spanish interpreter.

THE COURT: Thank you.

We have the matter of a change of plea before us in the case of Mr. Dominguez.

Now, this is the case that I met with you about very recently, and at the time Mr. Dominguez had indicated to us his concern for a, quote, "better deal." And I'm not at all certain that the parties have gone back, but it looks like they may have gone back for some kind of renegotiations.

Mr. Dominguez, I need to have you understand I can [5] not take your guilty plea unless you are making a free and voluntary guilty plea. To that end, I need to ask you a series of questions to make certain that you understand all of your rights, what the penalties are that you face, and that you understand that your plea

agreement is not binding on the Court when it comes time for sentencing.

At this point, do you represent to the Court that you have had enough time to discuss your case completely with your attorney?

THE DEFENDANT: Yes.

THE COURT: I'm going to proceed to ask you questions, but I wish to remind you now that if at any time during the course of my questioning you would like some more time to discuss your case privately with your attorney, you need to tell me of that fact right away.

Will you do that?

THE DEFENDANT: Yes.

THE COURT: And if you do not understand something I'm asking of you, please tell me that so I can clarify my question.

Will you do that as well?

THE DEFENDANT: Yes.

THE COURT: And if in the course of these proceedings you simply change your mind about pleading guilty, then you must tell me that too, because we have a [6] date reserved for your trial, which is October 19th.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I'm also going to ask that the clerk place you under oath, which means you are sworn in as a witness.

You are giving up the right to remain silent, the privilege against self-incrimination, when you take the

oath, and you promise to be truthful. If you make a false statement after you have been sworn in, you can be separately prosecuted for perjury or making a false statement.

Do you understand the things I am telling you?

THE DEFENDANT: I understand.

THE COURT: And are you willing to be sworn in as a witness and give up the right to remain silent and answer my questions truthfully?

THE DEFENDANT: Yes.

THE COURT: I will ask you to please face the clerk, raise your right hand, stand to be sworn.

(Defendant Sworn.)

THE COURT: Let me ask you—you may be seated.

Mr. Wilke, is that microphone working?

MR. WILKE: It is, your Honor.

Would you like it by the interpreter?

[7]

THE COURT: Please.

Please, state your full, true, legal name for me.

THE DEFENDANT: Carlos Dominguez-Benitez.

THE COURT: Can you spell the last name again for me again, please.

THE DEFENDANT: Carlos, C-a-r-l-o-s; Dominguez, D-o-m-i-n-g-u-e-z; Benitez, B-e-n- i-t-e-z.

THE COURT: Thank you.

What is your date of birth?

THE DEFENDANT: Six twelve sixty-eight.

THE COURT: Please, state the extent of your formal education or schooling.

THE DEFENDANT: In Mexico, I studied up to the second year in junior high. Here, I'm going to finish the course for my GED.

THE COURT: Here, meaning while you are in custody in the United States?

THE DEFENDANT: Yes.

THE COURT: And tell me what languages you speak.

THE DEFENDANT: Right now only Spanish.

THE COURT: Do you speak any English?

THE DEFENDANT: To tell you the truth, I have not put too much effort in it because of lack of practice, and I am embarrassed, but that is the—a purpose that I would like to do.

[8]

THE COURT: So you speak just a little English, but not well?

THE DEFENDANT: To tell you the truth, I prefer to say no, I don't speak it.

THE COURT: Do you read or write English?

THE DEFENDANT: I do not.

THE COURT: Do you read or write Spanish?

THE DEFENDANT: Yes, I do.

THE COURT: Both read and write?

THE DEFENDANT: Yes.

THE COURT: What kind of work have you done to support yourself?

THE DEFENDANT: Since I have been here, well, we brought something, I have worked as a musician, we formed two musical groups.

Later on I worked, I worked with a compadre, a church sponsor, in his group for five years. I also worked with another compadre of mine, church sponsor, and I helped him with his job as a mechanic. I have—I know how to do that a little bit.

THE COURT: Based upon your education, your experience, and this plea agreement that you have signed, do you believe it is in your best interest to go forward to plead guilty to Count One?

THE DEFENDANT: Yes.

[9]

THE COURT: Do you consider yourself to be in good health?

THE DEFENDANT: To tell you the truth, I have put in a lot of papers and I know that I am ill and I know that I have a pulmonary infection.

They have not listened to me. When I arrived, I was —I looked better, I looked heavier. It could be other problems. I asked—I had asked, I think it's called a request so they could check me over medically, but no, they have not paid attention to me.

THE COURT: Counsel, can I ask you to check that microphone? I'm not certain that it's working.

MR. WILKE: The light is on, your Honor, but it doesn't appear to be.

THE COURT: Let me just ask you to move the operations to the lectern, if you don't mind.

(Counsel and defendant comply.)

THE COURT: Let me ask you, sir, if you are now taking medication for any condition at all.

THE DEFENDANT: No, I'm not.

THE COURT: So as you stand before the Court today, are you under the influence of anything at all that impairs or affects your judgment?

THE DEFENDANT: I am fine. I have never done anything.

[10]

THE COURT: Do you feel well enough to proceed?

THE DEFENDANT: Yes.

THE COURT: Now, I'm going to go over with you the terms of the plea agreement that you have signed, but you must understand that the Court is not a party to this plea agreement. I just want to make certain that you understand what you have signed up to agree to, what you are agreeing to do, and make it clear to you that at this time no one has promised you or figured out what your sentence should be.

As you stand here now, has anybody promised you what the actual sentence will be in your case?

THE DEFENDANT: No.

THE COURT: You understand then from reading this plea agreement that if the Court accepts your guilty plea, we will ask the probation officer to prepare a presentence report, we will at a future date hear from you, your counsel, the U.S. Attorney, with regard to the sentencing guidelines and what is to be a proper sentence for your case under the law.

Is that your understanding?

THE DEFENDANT: Yes.

THE COURT: First of all, my understanding is that you wish to plead guilty to Count One of the Indictment.

Count One accuses you and others of a conspiracy to possess with intent to distribute methamphetamine.

[11]

And there is a second count, I believe, that is to be the subject of a motion to dismiss at the time of your sentencing.

Is that your understanding as well?

THE DEFENDANT: Yes.

THE COURT: Let me ask you or ask your counsel to turn to the page of the plea agreement where you signed your name.

It looks to me as though it was signed yesterday; is that right?

THE DEFENDANT: Yes, it is.

THE COURT: And what is the name that you signed, please?

THE DEFENDANT: Carlos Dominguez.

THE COURT: And let me ask your counsel who the person is that signed on the next page.

MR. WILKE: It's Joe Hernandez, your Honor, the interpreter, certified Spanish interpreter, and myself.

THE COURT: Thank you.

And going back to where you signed it, Mr. Dominguez, you have made the following statement over your signature:

"This agreement has been read to me in Spanish, the language I understand best, and I have carefully discussed every part of it with my attorney. I [12] understand the terms of this agreement and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing guideline provisions, and of the consequences of entering into this agreement. No promises or inducements have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. I am satisfied with the representation of my attorney in this matter."

Are all those things still true today?

THE DEFENDANT: Yes, they are.

THE COURT: Then I will rely upon what is above your signature and just review certain parts of this agreement with you.

First of all, the nature of the offense to which you are offering your guilty plea is the following:

That there was an agreement between two or more persons to possess with intent to distribute more than 500 grams of a substance containing a detectable amount of methamphetamine. And you became a member of that conspiracy knowing that its object was to possess methamphetamine with intent to distribute and intending to help accomplish that purpose.

Do you understand the nature of the offense to [13] which you offer your guilty plea?

THE DEFENDANT: Yes.

THE COURT: And from what you know of the circumstances, are you in fact guilty of that charge?

THE DEFENDANT: Yes.

THE COURT: In the next section of the plea agreement, there is a discussion about the penalties that you face.

You are reminded that absent a determination by the Court that your case satisfies the criteria, which apparently would be a safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.

Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4?

THE DEFENDANT: Yes.

THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?

THE DEFENDANT: No.

THE COURT: So you realize the Court may give you a ten-year sentence or more, as provided for by law?

THE DEFENDANT: Yes.

THE COURT: Knowing that, do you still want to go [14] forward with your guilty plea?

THE DEFENDANT: Yes.

THE COURT: You must realize that the statutory maximum sentence provided for by law is actually as much as life imprisonment, a fine of up to $4 million, and a mandatory special assessment which is required, and that is in the sum of $100.

Do you understand the maximum penalties provided for by law?

THE DEFENDANT: Yes.

THE COURT: And knowing those consequences, do you still wish to go forward with your guilty plea?

THE DEFENDANT: Yes.

THE COURT: Mr. Wilke, is there some reason to believe that this defendant will in fact qualify for the safety valve calculation?

MR. WILKE: Yes, your Honor, there is.

THE COURT: But you've told him that is still subject to the Court's determination?

MR. WILKE: Yes, your Honor.

THE COURT: All right.

You should also understand that supervised release is a period of time that follows any imprisonment. During the period of supervised release, you are subject to various restrictions and requirements. If you violate one or more [15] of those conditions of supervised release, you can be separately incarcerated, returned to prison for a term that could be as much as life imprisonment.

Do you realize the significance of supervised release?

THE DEFENDANT: I do.

THE COURT: And knowing that, do you still wish to go forward with your guilty plea?

THE DEFENDANT: Yes.

THE COURT: There must be in law a factual basis for the Court to receive your guilty plea.

In paragraph 6 of your plea agreement, the following information is offered as the factual basis for your guilty plea: That you agreed to sell methamphetamine for eight—or strike that—5800 dollars per pound to someone who turned out to be a confidential informant. You obtained the methamphetamine from Marcelino Gomez-Benitez.

On May the 13th, you, in the company of Gomez-Benitez and Esteban Barrera-Martinez, met with the person who was the confidential informant and delivered approximately 1.3 kilograms of a substance containing methamphetamine. You were to receive $200 for every pound of methamphetamine you sold to the person that turned out to be the informant. At the time of this transaction, on May 13th, you knew that you were selling methamphetamine and [16] that methamphetamine is a controlled substance.

Is that an accurate statement?

THE DEFENDANT: Yes, it is.

THE COURT: And you agree the Court should use those facts as a basis for accepting your guilty plea?

THE DEFENDANT: Yes.

THE COURT: Is there anything that you would add or change about the factual basis?

THE DEFENDANT: Well, the—to tell you the truth, the only thing that I had asked for was not able to be so. And let's go forward.

THE COURT: I'm not sure I understand your answer.

Is there something about the factual basis here that you would change or add to?

MR. WILKE: May I have a moment, your Honor?

THE COURT: Surely.

(Counsel and defendant confer.)

MR. WILKE: Your Honor, there's nothing else that needs to be added to the factual basis.

THE COURT: All right.

Let's go forward with the next section of your plea agreement, which discusses your constitutional rights.

This reminds you of the rights that you have in connection with having a trial, that you can have a trial before the Court if both sides will waive jury, or a jury [17] trial to find out if you are guilty or innocent of the charges against you in the indictment.

You will continue to have the assistance of counsel, both for trial as you have now, and for sentencing.

You have the right to have the case proceed to trial and require the government to prove your guilt beyond a reasonable doubt.

You have the right to confront or cross-examine the witnesses who would testify at your trial. This mean you or your attorney could question the witnesses to see if they are being truthful.

You would have the right to call witnesses on your behalf and to subpoena witnesses to testify.

At your trial, you could not be compelled to testify. And if you chose not to, that fact could not be used against you. The government would still have to prove your guilty beyond a reasonable doubt.

You will be giving up all of these rights except the right to assistance of counsel if you plead guilty today. There won't be a trial.

Do you understand all of your constitutional rights?

THE DEFENDANT: I do.

THE COURT: Do you have any questions about those rights?

[18]

THE DEFENDANT: No, I do not.

THE COURT: Do you understand that if the Court accepts your guilty plea today, the next phase of your case will be sentencing?

THE DEFENDANT: I do.

THE COURT: And is that what you intend?

THE DEFENDANT: Yes.

THE COURT: Specifically then, do you give up your right to have a trial, whether before the Court or before a jury?

THE DEFENDANT: I do.

THE COURT: Do you give up your right to cross-examine or confront the witnesses who would be present for your trial?

THE DEFENDANT: Yes.

THE COURT: Do you give up the right to call witnesses on your behalf, including using the Court's compulsory process to compel the attendance of witnesses?

THE DEFENDANT: Yes.

THE COURT: And do you, once again, give up the right to remain silent or the privilege against self-incrimination in order to make your guilty plea?

THE DEFENDANT: Yes.

THE COURT: In the next section of your plea agreement called "Sentencing Factors," I see that you, [19] through your counsel, have discussed with the U.S. Attorney's Office the applicable sentencing guideline factors.

This is based upon their study of the law and a prediction about where your base offense level would come out, minus some credits for safety valve conideration, which remains a possibility, apparently a strong one, as well as acceptance of responsibility on account of your early guilty plea.

As I discussed with you at the beginning, do you understand that these predictions are not going to be binding on the probation officer or the Court when it comes time to fix a proper sentence?

THE DEFENDANT: Yes.

THE COURT: And I see there is no agreement about your criminal history or criminal history category. However, it is the belief of the parties at this time that you did not use any violence or credible threats of violence, or possess a firearm or other dangerous weapon in connection with this offense charged in Count One; that the offense charged in Count One did not result in death or serious bodily injury to any person; and that you are not an organizer, leader, manager, or supervisor of others in the offense charged in Count One; and you were not engaged in a continuing criminal enterprise.

[20]

As I said before, the probation officer in investigating your case may come to a contrary view about the matter, and the Court has no way of knowing now what the probation officer will recommend. In other words, these stipulations are not binding on the Court.

Do you understand that?

THE DEFENDANT: I do.

MR. WILKE: May I have a moment, your Honor?

THE COURT: Of course.

MR. WILKE: Thank you.

(Counsel and Defendant confer.)

MR. WILKE: Thank you, your Honor.

We're ready to go forward.

THE COURT: All right.

And, Mr. Dominguez, have you understood everything that I have reviewed with you so far?

THE DEFENDANT: Yes.

THE COURT: All right.

In the next part of the plea agreement, there is an outline of what you are obliged to do and what the U.S. Attorney's Office is obliged to do. Apparently, the U.S. Attorney's Office has bound itself to make a recommendation for a sentence at the low end of the guideline range, provided that the range as calculated by the Court is 27 or higher and provided there is no downward departure.

[21]

Even if, and you must understand, even if the U.S. Attorney's Office adheres to its part of the plea agreement to make a recommendation for a sentence at the low end, that recommendation, like any other, is not going to bind the Court when it comes to fixing the sentence in your case.

Has that been made clear to you?

THE DEFENDANT: Yes, it is.

THE COURT: On page 8, there is a limited mutual waiver of appeal.

Here, in paragraph 17, you are telling us that you give up the right to appeal any sentence in this case, so long as the offense level comes out at 27 or below. And it appears that the government is likewise going to give up its right to appeal, so long as the offense level comes out at 29 or above.

There's a lot of initials written on page 8. So I guess I will ask Mr. Wilke to help us identify who signed what where.

MR. WILKE: Your Honor, there are three interlineations made at paragraph 17.

In the heading, "Collateral Attack" is taken out and that's Mr. Dominguez's, myself's, and I believe Ms. Luege's initials there.

The same three initials appear at line 19 where the number has been changed to 27.

[22]

And then again, the same three initials appear at line 25, indicating that that entire last sentence of para-

graph 17 has been taken out, and that sentence relates to a waiver of collateral attack.

THE COURT: I see.

And, Ms. Luege, those are your initials?

MS. LUEGE: That's correct, your Honor.

THE COURT: And is there anything that government counsel wants to add with respect to the safety valve issue?

In other words, is it fairly likely that this defendant will qualify, or can you make any other prediction at this point?

MS. LUEGE: I think it's possible that he may qualify.

THE COURT: And that's why the agreed upon facts as to three parts; is that right?

MS. LUEGE: That's correct.

THE COURT: All right.

Is there anything else that government counsel wants to add at this point?

MS. LUEGE: No, except I was thinking when I read the top of page 9 that I don't know if we should change —if we change that level 29 in the prior paragraph to 27, and it makes me think that perhaps we ought to change that to 27 also right there.

[23]

THE COURT: Is that your intent that it be a level 27 as the turning point for the mutual waiver of appeal?

MR. WILKE: Yes, it is, your Honor.

MS. LUEGE: I think that makes sense to make that change.

MR. WILKE: That is, your Honor.

Line 3, page 9, the 29 should be changed to 27 there.

THE COURT: Why don't you select a copy between the copies that you folks are working from that you can turn around and file after the hearing.

And let's make sure that it's clear to Mr. Dominguez what this change is because I think it's finalizing your agreement, as it were, with regard to the limited mutual waiver of appeal. But I would invite his initials as well.

MR. WILKE: Yes, your Honor.

May I have just a moment to explain this to him?

THE COURT: Yes, of course.

(Counsel and Defendant confer.)

MS. LUEGE: May I suggest, your Honor, if this is not improper on my part, but I was thinking that rather than file another plea agreement, because we filed the original, and I'm wondering if there is any chance that when we finish [24] the proceeding, the clerk of the Court can give us back the original that we filed, we could make the changes and give it back to the clerk so that we're not filing another document that is also—I mean, it wouldn't be an original, it would be now a copy.

THE COURT: It's sort of a supplement.

I don't know if you can pry it free from the clerk's office downstairs. I assume that that's where it resides in the file.

And if you want to then track Mr. Dominguez down and have him initial it, it's fine with me.

MS. LUEGE: I didn't realize that the Court didn't have—I thought maybe the Court had the original here. I didn't realize that procedurally that was—that is something in my book.

THE COURT: It was filed October 12th, which means it was done downstairs in the clerk's office and we wouldn't have the original here.

MS. LUEGE: I see.

THE COURT: And I'm willing to accept Mr. Wilke's representation if he tells me now there is a C.D. at line 3, page 9, and also a C.W. and C.R.L. on one copy which somebody has possession of.

MR. WILKE: I've explained that change to Mr. Dominguez. He's in agreement with it, your Honor.

[25]

And it is the parties' understanding that the number at line 3, page 9, should be 27. The copy I have indicates 29, but I've now crossed it out on mine and initialed it.

Could I just have you initial it right there? Your Honor, the three parties have now initialed and we can go ahead and file this copy with the clerk. And then I'll get another copy for Ms. Luege.

THE COURT: All right.

Let's go back to paragraph 17. The point here is, Mr. Dominguez, that you are essentially giving up the right to have any other court review your sentence by way of direct review, so that the sentence we give you here in the District Court will be your final sentence.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Is that what you intend?

THE DEFENDANT: Yes.

THE COURT: All right.

And the other part has been stricken out and the U.S. Attorney now is likewise bound to give up its right to appeal so long as the offense level comes out at 27 or above.

Now then, in the next section of your plea agreement, there is a discussion about who is and is not a [26] party to the plea agreement and the circumstances under which you may or may not be allowed to withdraw your guilty plea. I won't review that word by word, but I will go to paragraph 21.

In this paragraph, you represent, except as set forth herein, there are no promises, understandings, or agreements between the U.S. Attorney's Office and you or your counsel.

Is that absolutely true?

THE DEFENDANT: Could you repeat the question for me, please?

THE COURT: Yes.

At this paragraph, you are representing that, except as set forth herein—meaning, in this plea agreement—there are no promises, understandings, or agreements between the U.S. Attorney's Office and you or your counsel.

THE DEFENDANT: That's right.

THE COURT: You agree that's true?

THE DEFENDANT: Yes, it is.

THE COURT: Very well.

When I take your guilty plea, I take it because you represent to the Court that there is a factual basis for your guilty plea, that you understand what you are charged with, and you actually committed the crime charged in Count [27] One.

Are you ready for me to go forward and take your guilty plea?

THE DEFENDANT: Yes.

THE COURT: By your guilty plea then, you represent that you are not pleading guilty because of promises made, threats made against you, or mistreatments or misunderstandings, but because you desire to admit that you are guilty as charged in Count One.

Is that an accurate statement?

THE DEFENDANT: Yes, it is.

THE COURT: Mr. Dominguez, are you related to a codefendant in this case named Marcelino Gomez-Benitez or is it just a coincidence?

THE DEFENDANT: That's a coincidence.

THE COURT: I see.

All right. So no one close to you, related to you, associated with you has somehow been threatened in any way to make you come forward and plead guilty?

THE DEFENDANT: No.

THE COURT: Then looking back to the indictment, the charge against you is that you violated Title 21 of the U.S. Code, Section 846, which charges you with conspiracy to possess with intent to distribute methamphetamine. It sets out the allegations on pages 1, 2, and 3 of this indictment.

[28]

Would you like those read to you again at this time so you are fully mindful of what you are pleading to?

THE DEFENDANT: No, it is fine like this.

THE COURT: All right.

To the charge in Count One that you did violate Title 21 of the U.S. Code, Section 846, as set forth, pages 1, 2, 3, of the indictment, how do you now plead?

THE DEFENDANT: Guilty.

THE COURT: I accept your guilty plea to Count One and enter the following findings:

First of all, I am satisfied that Mr. Dominguez has understood these proceedings that we have conducted today and that he understands the terms of the plea agreement which we have reviewed at some length; that he understands that the plea agreement is not binding upon the Court when it comes time for sentencing.

And I wanted to make sure that Mr. Dominguez has understood all of my questions, because he was recently before the Court and indicated a disinclination to accept whatever it was that was then being considered by him for a disposition in this case.

For whatever reason, clearly Mr. Dominguez has convinced me that he has come forward to offer his guilty plea because it is what he wants to do; that he is satisfied the plea agreement is in his best interest; and that, of [29] course, he is guilty as charged in Count One.

So I rely upon the information imparted to the Court in the plea agreement, and what Mr. Dominguez has

told me after he has been placed under oath, and the representations made over his signature in the plea agreement, and what his counsel has represented as well.

Counsel has represented that he signed this plea agreement on page 11, dated 10-12-99. And I have assumed, but I will clarify that you, Mr. Wilke, were present throughout the proceedings when Mr. Hernandez was reviewing this plea agreement with your client. Is that right?

MR. WILKE: That's correct, your Honor.

THE COURT: So everything over your signature is true and correct?

MR. WILKE: That's correct.

THE COURT: And do you believe that this plea agreement is in your client's best interest?

MR. WILKE: Yes, your Honor.

THE COURT: So his guilty plea is actually made with the complete understanding, as best you can determine, about the sentencing guidelines and the penalties that are provided for by law, including the mandatory minimum sentence?

MR. WILKE: Yes, your Honor.

THE COURT: And do you believe that he understands [30] all of his constitutional rights?

MR. WILKE: Yes, I do, your Honor.

THE COURT: And have you made any promises to him about the exact sentence the Court will give him?

MR. WILKE: No, I have not.

THE COURT: But obviously you've discussed the sentencing guidelines with him very carefully?

MR. WILKE: That's correct, your Honor.

THE COURT: So he proceeds to make his guilty plea with your advice and consent and your concurrence?

MR. WILKE: That's correct, your Honor.

THE COURT: Thank you.

The Court finds that the defendant understands each and all of his constitutional rights, that he's knowingly, intelligently, and voluntarily waived those rights and that he's made his guilty plea freely and voluntarily and not because of promises, threats, or inducements made to him by others or the plea agreement.

We will go ahead and set the matter down for sentencing. I will ask the clerk to set a date and time.

THE CLERK: January 31st, 2000, 4 o'clock p.m.

THE COURT: Is that available for both counsel?

MR. WILKE: Yes, your Honor.

MS. LUEGE: Yes, your Honor.

THE COURT: Then the probation officer is directed [31] to prepare a presentence report returnable 1-31-2000, at 4:00 p.m. or such other date and time as the Court may order.

Let me ask counsel if you anticipate any particular difficult issues with regard to background or circumstances of the offense.

Mr. Wilke?

MR. WILKE: No, your Honor.

THE COURT: Ms. Luege, you agree?

MS. LUEGE: Yes.

THE COURT: All right.

Anything further in Mr. Dominguez's case today?

MR. WILKE: Nothing further, your Honor.

MS. LUEGE: I have nothing further, your Honor.

THE COURT: That being the case then, we will vacate the trial date as to this defendant and adjourn proceedings in his matter.

COUNSEL: Thank you.

(Proceedings adjourned.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. SA CR 99-67 AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

[Filed: Jan. 26, 2000]

DEFENDANT'S WITHDRAWAL OF REQUEST TO CONTINUE SENTENCING, POSITION RE: SENTENCING AND PERSONAL STATEMENT RE: SENTENCING

Defendant CARLOS DOMINGUEZ, by and through his attorney of record, Deputy Federal Public Defender Craig Wilke, hereby withdraws his request to continue the sentencing hearing from Monday, January 31, 2000, to Monday, March 6, 2000. This request was made by way of a stipulation and proposed order lodged with the Court on January 24, 2000. Mr. DOMINGUEZ no longer requires a continuance because defense counsel received the Presentence Report on January 25, 2000, and reviewed it with Mr. DOMINGUEZ on January 26, 2000.

Mr. DOMINGUEZ has no material objections to the Presentence Report. Mr. DOMINGUEZ concurs with

the Probation Officer's recommendation that he be sentenced to the mandatory-minimum term of 120 months imprisonment. Mr. DOMINGUEZ requests that the Court recommend to the Bureau of Prisons that he be incarcerated in a facility in the Southern California area.

Finally, Mr. DOMINGUEZ submits a personal statement, attached hereto as Exhibit A, for the Court's consideration at the time of sentencing.

Respectfully Submitted,

MARIA E. STRATTON
Federal Public Defender

Dated: January 26 , 2000 By: /s/ CRAIG WILKE
CRAIG WILKE
Deputy Federal
Public Defender

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
312 NORTH SPRING STREET, ROOM G-8
LOS ANGELES, CALIFORNIA 90012
213-894-4445
fax 213-894-4422

[SEAL OMITTED]

SOUTHERN DIVISION
411 W. Fourth Street
Santa Ana, CA 92701
714-338-2468

EASTERN DIVISION
4100 Main Street, Rm 137- A
Riverside, CA 92501
909-276-6170

COURT INTERPRETER SERVICES

DECLARATION OF INTERPRETER

I, the undersigned say:

I am SpanisH/English and English/Spanish Official Court Interpreter certified by the Administrative Office of the United States Courts and I have translated the attached document(s) from Spanish into English. I declare, under penalty of perjury, that to the best of my abilities and belief, this is a true and correct translation of the Spanish language text.

DESCRIPTION OF DOCUMENT(S)

Letter from Carlos Dominguez addressed to the Court.

Executed this 10th day of January, 2000, at Los Angeles, California.

Lenne Rosen-Kabe

/s/ L. ROSEN-KABE

Case Name:	U.S. vs Dominguez
Case Number:	SACR99-67-AHS
Ordered by:	DFPD Craig Wilke
File Name:	9967ahs.lrk
No. of Words:	591

TRANSLATION

(1) Honorable Judge Alice Marie Stotller [sic]

My name is Carlos Dominguez Benitez

[illegible flourish]

My reason for writing or the reason for my letter is to let you know under oath and in writing that the information I gave regarding my life to the probation officer, in the presence of my attorney, is completely true.

Because the real reason I'm incarcerated was due to forces beyond me. I am the one responsible for the support of my children and my mother, and it was right around that time that I was going through really tough economic times. My wife had given birth, I hadn't paid the rent and other food expenditures and bills. For the first time, I felt there was not way out, pressured, without knowing what to do. This opportunity came up, or rather, I was drawn into this business. I'm saying that I was drawn into it because I did not know the informant. I was prompted by despair, I agreed even though I had a feeling that something bad was going to happen to me because of the pressure from my expenses, and I was thinking that unless I paid the rent, where was I going to take my family? And, well, I did not have what it took to resolve the problem.

Maybe now my remorse won't do me any good, but I should tell you that it's not just that I'm remorseful, but also that it has made me very sad, because due to this error or offense that I committed, while looking for a way to resolve my economic problem back then, I only managed to lose my family. I've lost them, and perhaps forever, and even without knowing what justice has in store for me when I stand before you,

(2) it's very sad and painful for me, and believe me, I never imagined I would go through an experience like this one. I've lived my life alone, far away from my parents, that is to say, I grew up an orphan. Ever since I was very young I've had to face life. I had to work very hard and go it alone in order to get to my present age. I know and I understand the seriousness of my situation. I just hope for a little bit of consideration from you as a human being. I'm looking for a chance, a chance for my life not to be destroyed totally. I'm hoping with my heart full of hope, that on the day of my sentencing I may receive a fair sentence, so that not too long from now I might return to my country to fight for my home, to recover my family who are the reason for my existence. I again swear to you that my remorse is greater than the pain and sadness of having lost [crossed-out word], for now, my children, because I know that it was my mistake [illegible flourish] that caused all of this. Lastly, I want you to know that I'm never going to forget this experience, and even though I've never been a delinquent like the one I've been made out to be, I swear to you that I'll never again set foot in a jail, wherever I may be, for another error or offense like this one.

I take my leave most respectfully, hoping to receive a little bit of consideration from you, [who represent] justice.

Yours very truly, Carlos Dominguez. [illegible flourish]

Translator's note: punctuation has been added/modified by the translator.

(1) HONORABLE JUDGE ALICE MARIE STOTLLER

MI NOMBRE CARLOS DOMINGUEZ BENITEZ

LA RAZON POR LA QUE LE ESCRIBO O DEMI CARTA ES PARA INFORMARLE BAJO MI JURAMENTO DE PALABRA Y LETRA QU Y ESTANDO PRESENTE MI ABOGADO ES COMPLETAMENTE VERDAD

PUES LOS VERDADEROS MOTIVOS POR LOS CUALES ME ENCUENTRO PRISIONERO PARA MI FUERON DE MAYOR FUERZA SOY EL RESPONSABLE DE LA MANUNTENSION DE MIS HISO. Y MI MADRE Y PRESISAMENTA MUY FUERTES MI ESPOSA HABIA DADO A LUZ NO HABIA PAGADO LA RENTA Y OTROS GASTOS DE COMIDA Y BILLES POR PRIMERA VEZ M SENTI SIN SALIDA PRESIONADO SIN SABER QUE ACER SE PRESENTO LA OPORTUNIDAD O MAS BIEN MI POR QUE YONO CONOCIA AL INFORMANTE ARRASTRADO PO LA DESE-SPERACION ACEPTE AUN PRESINTIENDO QUE ALFIC MALO ME PASARIA POR LA PRESION DE LOS GASTOS A DONDE LIEVARIA A MI FAMILIA Y PUES NO TENIA LO NECESARIO PARA SULVENTAR EL PROBLEMA

AHORA QUIZAS MI ARREPENTIMIENTO NO SIRVA DE NADA PERO DEVO DECIRIE QUE NO NOMAS ME ARREPIENTO SINO QUE TAMBIEN ME HA DOLIDO MUCHO BUSLANDO SOLO LOGRE PERDER AMI FAMILIA LOS HE PERDIDO Y QUIZAS PARA SIEMPRE Y AUN SIN SABER QUE SUERTE ME DEPARA ANTE USTEDES LA JUSTICIA PARA MI

(2) ES TRISTE y MUY DOLOROSO Y CREAME NUNCA IMAC VIVIR UNA ESPERIENCIA COMO ESTA MI VIDA LA VIVIDO SOLO LEJOS DEMIS PADRES O ES DECIR CRESI HIUERPANO DESDE MUY NINO TUVE QUE ENFRENTARME ALA VIDA TUVE QUE TRABAJAR MUY DURO Y VALORARME POR SI MISMO PARA LLEGAR AL EDAD QUE TENGO SE Y COMPRENDO DELO GRAVE DE MO SITUACION SOLO ESPERO UN POCO DE CONSI OPORTUNIDAD, UNA OPOR-TUNIDAD A QUE NO DESTRUY DE ESPERANTA QUE ELDIA DEMI SENTECIA SEMI DE UN CASTIGO JUSTO PARA QUE EN UN TIEMPO NO MUY LEJANO PUEDA REGRESAR AMI PAIS PARALUCHER POR RECONSTRUIR MI HOFIAR Y REUPERAR AMI FAMILIA YA QUE SON LA RAZON DE MI EXISTIR NUEVAMENTE LE JURO QUEMI ARREPENTIMIENTO ES MAS GRANDE QUE EL DOLOR Y LA HIJOS PORQUE SE QUES ABASE DE MI HERROR SEPA QUE ESTA EXPERIENCIA NUNCA LA OLVIDARE Y AUNQUE NUNCA HE SIDO UNDELINCUENTE COMO PISARIA LA CARCEL DONDE QUIERA QUE ESTUVIERA POR OTRO HERROR O FALTA COMO ESTA.

ME DESPIDO RESPETUOSMENTE DE USTED Y CON LA ESPERANTA DE OBTENER UN POCO DE CONSIDERACION POR PARTE DE USTEDES LAJUSTICIA.

ATTE CARLOS DOMINGUEZ

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Santa Ana, California
Monday, January 31, 2000

APPEARANCES

FOR THE PLAINTIFF:

ALEJANDRO N. MAYORKAS
United States Attorney
CARMEN R. LUEGE
Assistant United States Attorney
411 West Fourth Street
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(714) 338-3538

FOR THE DEFENDANT:

CRAIG WILKE
Deputy Federal Public Defender
411 West Fourth Street
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Santa Ana, California 92701
(714) 338-4500

[5]

THE CLERK: Calling item number 14, SA CR 99-67-AHS, United States of America vs. Carlos Dominguez.

Counsel, your appearances, please.

MS. LUEGE: Good afternoon, your Honor.

Carmen Luege on behalf of the United States.

THE COURT: Thank you.

MR. WILKE: Good evening, your Honor.

Craig Wilke on behalf of Mr. Dominguez who is present, in custody.

THE COURT: Yes. I'm sorry to have to make you wait behind a matter that was not intended to be lengthy.

Is the Court's interpreter still present as well?

MR. WILKE: Yes. Mr. Dominguez is being assisted by the Spanish interpreter.

THE INTERPRETER: Good afternoon, your Honor.

Dolores Gordon, certified federal interpreter. My oath is on file.

THE COURT: This matter is trailing behind the Roberson case. We appreciate your patience.

The Court has before it the matter of sentencing after the defendant's guilty plea to Count One of the Indictment. And we have been able to review the filings by [6] the parties.

We need to make sure that the defendant is prepared to go forward today, since the presentence report has not been in his hands for the full 35 days.

MR. WILKE: Your Honor, defense counsel is prepared to go forward, but I would ask Mr. Dominguez respond directly to the Court.

THE COURT: Yes.

MR. WILKE: I've been given contrary statements from him about that.

THE COURT: Mr. Dominguez, the rules require that the report from the probation officer be available to you for at least 35 days, and we note that when the presentence report was given to us, that it was disclosed to counsel and to you on January 25th.

Obviously, this is not 35 days later. I know that, according to your counsel's filing, you've had a chance to review it back on the 26th.

Are you satisfied to go forward with your sentencing today or would you like more time to consider it?

THE DEFENDANT: I would like more time.

THE COURT: All right.

Mr. Wilke, give us a date that's serviceable on your calendar, please, and we will reset the matter.

THE DEFENDANT: I even wrote a letter, your Honor.

[7]

THE COURT: I'm sorry, I can't hear you.

THE DEFENDANT: I even wrote a letter, your Honor.

THE COURT: And the purpose of the letter is to do what?

THE DEFENDANT: For the Court.

THE COURT: But does it pertain to a resetting of the matter, or does it pertain to sentencing?

THE DEFENDANT: To talk about this sentencing, and also about my attorney because I'm not satisfied with the help that I have received from him.

THE COURT: Well, let me ask Mr. Wilke as an officer of the Court, a) to give us a new date for a hearing and b) to accept from the defendant the letter so that it can be properly filed and made of record as opposed to something other than presented by way of something in an envelope.

MR. WILKE: As to a date, your Honor, I would ask for March 13th, that it's over 35 days. And I'm not available March 6th, which I believe would be the next 35-day time.

THE COURT: All right.

MR. WILKE: I'll be in L.A. that day, but March 13th.

THE COURT: And, Ms. Luege, would that work for you?

[8]

MS. LUEGE: That's fine, your Honor.

THE COURT: Let me ask the clerk to locate an open time spot on our March 13 calendar for further proceedings.

And then the letter, if appropriate, needs to be filed under seal if it's got confidential information in it. And, Mr. Wilke, if you feel that you can not submit it to the Court, then I'll let the defendant give it to the clerk.

MR. WILKE: Your Honor, I have no problem filing it under seal with the Court.

I believe Mr. Dominguez may have some objection to me seeing the letter, though, and I'd ask the Court to inquire of him.

THE COURT: Mr. Dominguez, do you have any objection to the Court receiving your letter through Mr. Wilke who knows how to properly file it with the Court, or is it something that you want to leave in the envelope for me to see directly?

THE DEFENDANT: I want this letter to go to the Court, to the Court only, because I tried to send the letter to the Court through Mr.—through my attorney, and he did not deliver it.

THE COURT: You must understand that a) I will take it from you, but b) I may decide to file it as part of the public record. There is no promise or guarantee that [9] whatever it is you write to me will necessarily be private from the prosecutor or from your attorney.

Now, knowing that, you're welcome to give it to me.

THE DEFENDANT: There is no problem with me for my attorney to read it, but the most important thing is that the Court also reads it.

THE COURT: Yes. And I will do that.

And I will also make it of record, one way or the other, so it's clear we have received it.

What we will do is put your sentencing over to March the 13th.

What time?

THE CLERK: Three thirty.

THE COURT: Three thirty in the afternoon, so that you've got more time to consider the presentence report.

We will accept the letter from you, and we will have the matter go forward on that date. If in the event I read something in your letter that is of concern to me and/or to counsel if it is in fact disclosed to counsel that necessitates other proceedings, we will calendar a status conference before the date of March the 13th at 3:30 p.m.

In light of these proceedings, is there anything else, Ms. Luege, that you wish to inform us of?

MS. LUEGE: Nothing further, your Honor.

[10] THE COURT: And how about you, Mr. Wilke?

MR. WILKE: One brief thing, your Honor.

Just for the record, I would note that as part of the filing on January 26th, attached thereto was Exhibit A which is a letter from Mr. Dominguez to the Court with the English translation.

THE COURT: Yes. And I've received that and I have read that.

So perhaps that's one letter that Mr. Dominguez has referred to in passing today. But that letter is already before us and I trust that you can show it to him as you sit there now, so that he is aware we have already read that.

(Counsel complies.)

THE COURT: All right.

That's the Court's order in this matter. Thank you.

MS. LUEGE: Thank you, your Honor

THE COURT: We stand adjourn.

(Proceedings adjourned.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CRIMINAL MINUTES - GENERAL

Case No.: SA CR 99-67 AHS Date: February 2, 2000

DOCKET ENTRY:

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date: 2/4/00 Deputy Clerk[signature illegible]

PRESENT: HON. ALICEMARIE H. STOTLER, JUDGE

Debra Beard	Not Present	Carmen R. Luege
Deputy Clerk	Court Reporter	Asst. U.S. Atty not present

U.S.A v. (DEFENDANTS LISTED BELOW)

(1) Carlos Dominguez
not present x custody __ bond

ATTORNEYS FOR DEFENDANTS

(1) Craig Wilke, DFPD
not present x appointed

PROCEEDINGS:

(In Chambers) ORDER FILING LETTER OF DEFENDANT

On January 31, 2000, the Court received the attached letter from the defendant in open court.

The letter is ordered filed. The clerk is directed to serve this minute order along with the letter on the attorneys of record and defendant Dominguez.

[Received: Feb. 1, 2000]

Dear Honorable, Alice Marie Stotler,

My name is carlos Dominguez I am 31 years old and currently incarcerated at Santa Ana, Santa Ana, CA. I have been I custody since 5/13/99 and will be respectfully be in front of you and your court for sentencing on 1/31/00 the reason for this letter is not only to let you know about myself but also to inform you of the unfair representation I feel I have received from my lawyer. I feel that my lawyer has done nothing for me from the start. I asked for a meeting to be set up with the D.E.A. with my lawyer responding "they do not want to talk to you" and a meeting was never set up not because the D.E.A. declined but only because my lawyer never asked. Also I asked for a meeting to be set up with the D.A. witch to say never happened because of my lawyer. I wanted to asked you for a new lawyer and when I had the chance to in court my lawyer whispered in my ear that I was not allowed to say anything to you or to speak openly with the court. With me having a langue barrier I could not ask you if this were true. Now that I am to come before you and your court to get sentenced and I feel that I was not fairly represtated. I respectfully ask you to put off my sentencing due to the fact I feel I was railroaded into signing the deal that I signed. Also I respectfully ask you that you assign me a new lawyer and a fair

amount of time in witch me and my new lawyer may go over my case. I am sorry that this notice came to you at such a short time, but I knew of nothing else to do. I thank you for your time and I pray that the court will find my request in order.

Sincerely,

Carlos Dominguez

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CRIMINAL MINUTES - GENERAL

Case No.: SA CR 99-67 AHS Date: March 6, 2000

PRESENT: HON. ALICEMARIE H. STOTLER, JUDGE

Debra Beard	not present	not present
Deputy Clerk	Court Reporter	Asst. U.S. Attorney

U.S.A vs. (Defts listed below)
Carlos Dominguez
(1) T/N Carlos Dominguez Benitez
not present xx custody __ bond

Attorney For Defendants

(1) DFPD Craig Wilke
not present __apptd __retnd

PROCEEDINGS:

(In Chambers) ORDER THAT DEFENDANT'S LETTER TO COURT SHALL BE FILED AND SERVED ON ALL COUNSEL OF RECORD

On March 3, 2000 the Court received a letter from Carlos Dominguez Benitez. The Court orders the Clerk to file the letter and serve a copy of the letter on all counsel of record.

The Clerk shall serve a copy of this minute order on all counsel of record in this action and the defendant at the last known place of incarceration.

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL. POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE, MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION, ON THIS DATE.

DATE: 3/7/00

[Signature Illegible]
DEPUTY CLERK

cc: Counsel of Record
Defendant

[Received: Mar. 3, 2000]

Honorable Judge Alice Marie Stoler

My name is *Carlos Dominguez Benitez*, with all due respect I ask for your forgiveness for bothering you again.

Honorable Judge the reason I write this letter is to explain that I feel I didn't get the opportunity to get proper legal representation in my case. My lawyer *Craick Wilke* and I never had good communication he never listened to my opinions or petitions. Whenever I asked him questions he always answered me with as little information as possible. He has always made me feel like the worst criminal of all. He has made me get into a state of desperation. I don't know what to do I feel that my life dos not life anymore. I feel that I'm waiting for my death. I ask myself why so much pain why is tit that they deny me of an opportunity to redeem myself. I ask myself if my mistake is the worst in the world.

My lawyer, since the first meeting we had all he talks to me about was a sentence of 10,15 and 20 years. I understand and accept my responsibility but nobody has ever understood me or considered anything of why I did what I did. I never looked for anyone they came looking for me. Like I told the Government I did it as necessary I did it to comply with me economic of my program and my family well being knowing that my family was in economic problems I did what I did now I'm incarcerated and facing the biggest problem I have

ever had in my life that why I ask for your consideration in my case and if I could have the proper legal representation thank you *Honor Alice M. Stodler*

Sincerely,

/s/ [Signature Illegible]

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

Monday, March 13, 2000

APPEARANCES

FOR THE PLAINTIFF:

ALEJANDRO N. MAYORKAS
United States Attorney
CARMEN R. LUEGE
Assistant United States Attorney
411 West Fourth Street
Suite 1119
Santa Ana, California 92701
(714) 338-3538

FOR THE DEFENDANT:

CRAIG WILKE
Deputy Federal Public Defender
411 West Fourth Street
Suite 7110
Santa Ana, California 92701
(714) 338-4500

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[4]

THE CLERK: Calling item number 31, SA CR 99-67-AHS, United States of America vs. Carlos Dominguez.

Counsel, your appearances, please.

MS. LUEGE: Good afternoon, your Honor.

Carmen Luege on behalf of the United States.

THE COURT: Thank you.

MR. WILKE: Good afternoon, your Honor.

Craig Wilke on behalf of Mr. Dominguez who is present, in custody, being assisted by a Spanish interpreter.

I do apologize for my lateness.

THE COURT: Thank you.

And the interpreter's appearance, please.

THE INTERPRETER: Good afternoon, your Honor.

Dolores Gordon, certified federal interpreter. My oath is on file.

THE COURT: Thank you.

The Court has before it once again the matter of sentencing in Mr. Dominguez's case. Again, we have given to counsel a tentative ruling concerning our findings based upon the parties' filings and the presentence report.

At this time, the 35-day period has been passed, [5] irrespective of waiver, and we've had the opportunity, I'm certain, for what needed to be accomplished to be accomplished.

At the last hearing, the Court did receive a communication from Mr. Dominguez and, as promised, it

was filed and distributed to counsel. That was on January 31, 2000.

And on March 6, 2000, the Court received an additional letter from defendant indicating at this time that he feels he has not had good communication with Mr. Wilke and explaining to the Court the reasons for the commission of the offense, as I read the last paragraph.

I'm going to proceed with the sentencing. I fully expect to hear from Mr. Dominguez. And to the extent that he needs to amplify or expand upon what he has already written to us, he is welcome to do so.

Let me also say that, based upon counsel's request to the Court, I'm inclined to make the recommendation requested that defendant be placed in a Southern California facility. And as before, I have read the defendant's letter to the Court that was submitted in defense counsel's submission to the Court earlier.

As I recall, we started before and Mr. Wilke had brief remarks. I think we should start once again, turn to Mr. Dominguez for any remarks that he may wish to give to [6] us, and then hear from the government. And if that's not a historical recitation that's fully accurate, counsel may correct me.

Let's turn to Mr. Wilke now.

MR. WILKE: Thank you, your Honor.

With regard to the appropriate sentence, your Honor, the only issue there is where within the guideline range he should be sentenced. As the Court is aware, this is a ten-year mandatory minimum case and there is no availability for relief from the mandatory minimum sentence.

We would submit that a sentence of 120 months, which is the mandatory minimum, is appropriate. It constitutes approximately the middle of the range of the applicable sentencing guideline range, which is 108 to 135. And in light of the fact that this is—will be the first prison commitment for this defendant, ten years is a lengthy period of time.

One point that I would like to bring to the Court's attention is, since being incarcerated, Mr. Dominguez has completed his equivalency degree, his G.E.D. and been attending those classes; he has got some documentation to that effect that he's brought with him. It has not been previously filed with the Court, but I am bringing that to the Court's attention. I think that does bear upon where within the range he should be sentenced.

[7]

And if the Court would like that documentation, we can file that either after the hearing, or the Court could look at it now.

THE COURT: I can accept your representation.

Did you say he's actually received the degree?

MR. WILKE: He's received the certificate, yes, your Honor. And he has that with him.

THE COURT: All right. Good.

No, I'd just as soon he keep it since it's valuable proof.

MR. WILKE: The other factor, I think, that the Court should be aware of is that this defendant—and I think this largely explains this defendant's lack of satisfaction with his legal representation.

This defendant entered into a plea agreement with at least an expectation that he would be eligible for a sentence below the mandatory minimum. And when it became clear upon receipt of the presentence report that that wasn't available, that is really what precipitated, I believe, the breakdown in attorney-client—the attorney-client relationship that the Court has become aware of.

THE COURT: I'm not sure it's such a breakdown from what I have been able to ascertain from defendant's letters, but I can see the criminal history for this [8] defendant took him out of the eligibility category that apparently others in similar circumstances were qualified for.

MR. WILKE: Correct. And which the parties—as is reflected I think in the plea agreement, the parties expected he would qualify for, at least going into it.

The government, both parties stipulated as part of the plea agreement a safety valve application, at least a safety valve factor. So the safety valve was contemplated, but then turned out not to be appropriate in light of the criminal history.

With that, given that he is looking at a significant period of time that is far in excess of what he expected, and he has made efforts to at least accomplish something beneficial to his life during the time he's been in jail so far, I would submit that a sentence of 120 months is appropriate and I'd ask the Court to give him that sentence.

THE COURT: Very well. Thank you.

Mr. Dominguez, let me invite you to make any statements that you wish to make. Under the circumstances, I think it may be appropriate to ask you and

the interpreter to stand at the lectern since the sound system does not appear conducive to speaking from the counsel table.

And I'll be pleased to hear from you with regard [9] to anything you wish to say regarding the judgment and your case.

THE DEFENDANT: I have never felt that I had the proper representation, the way it should have been in my case.

From the beginning, I never had any knowledge about the points of responsibility, the safety valve, or anything like that. I honestly, from the beginning, I accepted responsibility through my attorney, but he never paid any attention to me, to what I told him about the problem that I had. I told him from the beginning that I had a problem, that I was attending a program. And at the end, he told me allegedly that I had never told him, that I had never notified him of it.

I have never hidden anything in my case about the things that I have done. Everything I said—I have said has been the truth and the reason why I did it. And I always asked for another chance. I always asked him for an opportunity to meet with a government agent, and he never wanted to do that.

And every time he came to see me, he treated me like if I was the worst of the criminals, making me feel badly. From the very, very beginning, he told me that it was going to 10, 15, or 22 years. And I ask myself, how could that be possible.

[10]

And honestly, I have never felt comfortable even when I asked him to postpone the sentencing and he

said he was not going to do that. And I asked him why not, and he said that there should have been a very important reason to do it. And I told him, "Isn't the ten years that I am going to get not important enough?"

I have always told him about my family and about my children who are depending on me. And honestly, I assert my—I assert responsibility, I made a mistake. However, I am not the type of criminal that I'm being made to be.

The program that I had I explained to my attorney from the first day that he came to see me. And I was attending that program doing properly, and really the crime that I committed, somebody sought me, I didn't look for the crime.

THE COURT: Can I ask you if you are talking about the diversion program from one of the state courts?

THE DEFENDANT: The drugs?

THE COURT: Yes.

THE DEFENDANT: Yes.

THE COURT: And so you are telling me that this was something that you had discussed with your attorney?

THE DEFENDANT: Yes.

THE COURT: And when you talk about the problem you had, is that also related to being on a diversion [11] program from the state court?

THE DEFENDANT: Yes.

THE COURT: So you are indicating that you believe everyone knew about your criminal history?

Is that what you're saying?

THE DEFENDANT: Well, from the very beginning when he went—when he came to see me, I explained it to him.

THE COURT: I understand.

So what you're indicating to me is that you believe from the beginning you had disclosed that you had a criminal record; is that right?

THE DEFENDANT: Yes.

THE COURT: And so are you suggesting now that because your attorney knew about it, that the government attorney should have known about it and the Court should have known that you would not qualify for the, quote, "safety valve," as the guidelines calls it?

THE DEFENDANT: Actually, that's what was never explained to me.

THE COURT: Well, the plea agreement that was entered into and discussed with you, I think talked about the safety valve and explained that you might qualify.

Do you remember that?

THE DEFENDANT: When I signed here before the Court, I signed at a level 27.

[12]

THE COURT: Well, I think what you signed is of record and it speaks for itself.

I'm trying to understand what it is that somehow is wrong with your case, and so far I'm not hearing anything that is wrong with your case except that you may not be comfortable either with the attorney or how the case is coming out. Yet you continue to tell me that you have accepted responsibility for what you did wrong.

THE DEFENDANT: Yes. I have—

THE COURT: I'm sorry.

THE DEFENDANT: I have always accepted responsibility, but from the beginning I have felt that my attorney and I didn't have enough communication.

THE COURT: And what would you have be different?

THE DEFENDANT: That he should have explained to me from the beginning what it was meant by the points, by the safety valve, by everything. And I never knew about that.

THE COURT: Well, we had a lengthy change of plea proceedings, Mr. Dominguez, and it's difficult for me to accept what you say in light of those proceedings that we conducted. But I'm willing to hear you out and I want to make clear that we are proceeding to the sentencing today.

I do not see that there is something before me or of record that says there is something wrong with the way [13] your case was handled or how it comes out, although I do understand that you may be disappointed. Therefore, I do not intend to change your attorney, but I want to make sure that we hear what you have to say, not only about your case generally, but about you specifically.

Mr. Wilke has already told us that you have achieved the general education degree, which hopefully indicates a successful period of time in custody which will lead to better things after you are released.

Please, continue.

THE DEFENDANT: I'm sorry.

When I was arrested by the state, allegedly I was given formal probation and I was told that if I did not comply, if I didn't do everything with the formal probation that I was given, I was going to get from three to six months in jail.

And that's what I don't understand. If I was at my first offense level here, I signed at a level 27. When Probation came to see me and I talked to them about my life and they came back with a report, with a level 29 and a number 3 on the crime, that's what I don't understand.

THE COURT: I understand how it came out that way.

They have researched through the probation officer these offenses. And under the guidelines, these are the proper points assigned to you for those prior proceedings. [14] There are many names used in these cases, but they come back to you and you do not deny that. And the way these offenses were researched shows to me that they have been properly calculated so as to take you out of category 1 and put you in category 3.

THE DEFENDANT: When I was incarcerated before and I went before the Court, it is explained to the Court in that report. I paid for it, I was 20 days incarcerated and I paid for it.

And the only thing that was pending was the program, and I was doing the program. That's why I don't understand. Allegedly they are giving me two more felonies.

THE COURT: No, that wouldn't be right.

But I suspect you didn't finish the program because you got arrested and therefore a bench warrant was issued when you didn't complete it.

THE DEFENDANT: Yes, I didn't—I didn't comply with the program. How could I? I was arrested here.

THE COURT: Right.

THE DEFENDANT: I was attending the program and I was doing things well until the informant, I don't know who gave him my number, and I was pulled by necessity.

I had all the expenses for the program, all the expenses for my family, my—my companion had just had a baby. I had too many expenses, and due to necessity I find [15] myself here.

THE COURT: Yes, sir, I do understand that.

Is there anything else you would like to say?

THE DEFENDANT: That was the most important, at least for you to listen to me.

THE COURT: Yes, sir. Thank you.

Please, take a seat.

THE DEFENDANT: Thank you.

THE COURT: Let me invite government counsel to respond to both defense counsel's remarks and any of the statements made by defendant.

MS. LUEGE: I think that Mr. Wilke is correct when he points out that there's nothing much that anyone can do in this case because we're up against this mandatory statutory minimum of ten years.

I do want to clarify, I hope clarify, for the record a couple of things. Initially, when counsel and I negoti-

ated this plea agreement, we both envisioned that he qualified, that the defendant would qualify for the safety valve. The government was unaware that defendant had any prior convictions that would intervene with that.

Shortly before entering the actual guilty plea, we found out that there was this diversion on this defendant and that that had occurred, as the Court can see at paragraph 83 of the presentence report, on April 6th of '99. [16] And we had arrested this defendant, I think, in May of '99. So we found out about this and I immediately—that is, we, the government found out about it —and I immediately discussed it with Mr. Wilke, that we had this diversion.

And I was concerned about the effect that that would have on the safety valve and the terms of the plea agreement that in good faith we had sent counsel. In our discussions, Mr. Wilke and I decided to leave the agreement very much, I mean, there were changes made here in court because Mr. Wilke made some changes in court that day, the day of the actual change of plea.

But basically, with regard to the safety valve issue, we decided that Mr. Wilke wanted to have the opportunity to argue to the Court that he would still qualify for the safety valve because there was no final judgment, because maybe he would only end up with one criminal history point and then he would still qualify, even with that problem.

And so, because we had issued the plea offer in good faith and Mr. Wilke's present representation to the government made sense, I could see a possibility of intervening factors making the safety valve still appli-

cable, we left the agreement as we had originally drafted it. There were a couple of changes made here in court that day, but then we proceeded.

[17]

What Mr. Wilke and I found out, once we got the Pretrial Services report, and I know this from our conversations, that it was after we got the probation report —I'm sorry if I called it pretrial—the probation report, we found out that there was this other criminal history points, as stated in paragraph 77 and paragraph 80, and paragraph 90 of the probation report.

And these additional criminal history points had nothing to do with the diversion issue that Mr.—well, at least mostly two of them didn't have anything to do with the diversion issue that Mr. Wilke and I had been worried about. So that even if Mr. Wilke came here and argued to the Court that, you know, he should only get one criminal history point for the diversion and so still qualify for the safety valve because he had these additional points, that argument would now be meaningless.

And that is how we find ourselves in the situation we're in, which is, the government and the defense counsel entered into a good faith—and the defendant entered into a good faith plea agreement, and because of this unforeseen situations, the defendant can not receive the benefit of the bargain in essence, because he has to go and serve the mandatory minimum ten years.

And I think that explains, at least from the government's perspective, what occurred. And I wanted to [18] put that on the record because official proceedings may come up as a result of this, so that at least there's a record of the government's understanding of what happened in this case.

And I don't know whether the Court has any questions for me.

THE COURT: I alluded to the fact that these prior convictions were in other names.

MS. LUEGE: Yes.

THE COURT: And that is significant, I think, in the sense that persons entering into a plea agreement for one Carlos Dominguez-Benitez, wouldn't necessarily be looking for charges against Antonio Cardinez, Carlos Alberto Dominguez, and a series of other names. And that's what I was trying to explain to defendant, that how this case comes out criminal history category 3 is very apparent, I think.

MS. LUEGE: Yes.

THE COURT: The diversion is also a conviction, albeit not a sentence, as I read these proceedings. And my understanding is that the state court seems to require the conviction by the guilty plea.

MS. LUEGE: That's correct.

THE COURT: And so long as a person does not get arrested in the interim and successfully completes the diversion program, then there would not be a sentence and a [19] dismissal, presumably. Unfortunately, Count One here, this offense behavior, interrupted that program which defendant tells us was going well.

So I understand how it came out this way. I think the defendant understands, but is not pleased with this. And I can understand that, but I do understand as well how the plea agreement came out.

MS. LUEGE: And let me just clarify that also.

When the government first obtained the rap sheet for this defendant, the criminal history, it did not reflect any of these offenses. And I think it is, the Court is correct, because the agent was running a certain name and it just, you know, the record wasn't there for the person and we didn't find it.

THE COURT: And with regard then to defense counsel's position, obviously the government is in agreement that the low end of the sentencing guideline would be appropriate under all of the circumstances.

MS. LUEGE: Oh, certainly, your Honor.

And that's within the terms of the plea agreement, and the government stands behind that plea agreement and its recommendations in every way, except we are precluded from going below that because of the safety valve, your Honor.

THE COURT: Because of the mandatory sentence.

MS. LUEGE: The mandatory minimum, yeah, the [20] safety valve.

THE COURT: Thank you.

MS. LUEGE: Thank you.

THE COURT: Is there any legal cause why the sentence should not now be pronounced?

MR. WILKE: No, your Honor.

THE COURT: Very well.

First of all, the Court has read and considered not only the presentence report, but the letter that Mr. Dominguez wrote to the Court and the reasons why this crime was committed. They are not unusual reasons, but they do result, not uncommonly, in ten-year sentences and much longer.

While I think there is reason for Mr. Dominguez to be disappointed in the outcome, that is to say, he must be sentenced under the mandatory minimum and he does not qualify for the safety valve, I can not see that anything was mishandled or anything came out wrong. In fact, the government attorney's explanation is essentially what I regard to be the background to the case, and the research by the probation officer bears out this outcome.

His disappointment, as I say, is quite understandable, especially in light of the proceedings as to other persons in the case. But he nonetheless has the criminal history category 3. Therefore, I do rule in [21] accordance with the tentative ruling and adopt the probation officer's recommendation.

I will proceed to sentence defendant in accordance with that recommendation and we will, of course, be relating back his sentence from the time of his incarceration, which was May 13, 1999.

In addition, the Court will advise the defendant of his right to appeal in light of the fact that the sentence came out at offense level 29 rather than 27.

Finally, we will grant the defendant's request to recommend placement in a Southern California facility for the reasons identified by counsel.

As to the count of conviction, it is the judgment of the Court that the defendant be imprisoned for a term of 120 months, that is on Count One.

He is not required to pay any fines because he does not have the ability to pay a fine.

There is a $100 special assessment which is mandatory and which is ordered to be paid forthwith.

Upon defendant's release from custody, he is placed on five years of supervised release. He shall comply with the rules and regulations of the Probation Office and General Order 318.

He is ordered to participate in outpatient substance abuse treatment and submit to drug and alcohol [22] testing as instructed by his probation officer.

He is instructed to abstain from using illicit drugs, using alcohol, and abusing prescription medications during the period of supervision.

During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment.

Condition 4, the defendant shall comply with the rules and regulations of the Immigration and Naturalization Service, I.N.S., and if deported from this country, either voluntarily or involuntarily, not to reenter the United States illegally.

Defendant is not required to report to the Probation Office while residing outside of the United States. However, within 72 hours of release from any custody or any reentry to the United States during the period of court ordered supervision, the defendant shall report for instructions to the U.S. Probation Office located in this building.

Next, the defendant shall not obtain or possess any driver's license or any form of identification in any name other than his true legal name, unless he has the prior written approval of the probation officer.

And finally, the defendant shall not use, for any purpose or in any manner, any name other than his true legal [23] name.

The Court selects the low end of the guideline range because it is recommended by the probation officer, because it is sought by defense counsel and urged by government counsel, and it is an appropriate sentence given the mandatory nature of the law involved.

I now remind the defendant that if he wishes to appeal the sentence pronounced today, that is to say, to have the reviewing court review the sentence, you must file a notice of appeal with the clerk of this Court no later than ten days from today's date. If you do not file a notice of appeal, there will be no appellate review of the Court's sentence.

Furthermore, if you are unable to hire counsel to represent you on the appeal, you may apply to the Court for appointment of counsel by submitting a financial affidavit to show that you are eligible for court appointed counsel to represent you on the appeal.

At this point, it appears that we have one count remaining.

Government counsel?

MS. LUEGE: Yes, your Honor.

The government moves to dismiss Count Two of the Indictment.

THE COURT: Count Two is dismissed as to this [24] defendant on motion of the government and in the interest of justice. And that will be the Court's order.

Is there anything else on defendant's behalf at this time, Mr. Wilke?

MR. WILKE: No, your Honor.

THE COURT: And on behalf of the government?

MS. LUEGE: No, your Honor.

THE COURT: Thank you then.

And we will go ahead and excuse Mr. Dominguez and counsel, and go on to our next case.

(Proceedings concluded.)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

Social Security:	None
Residence:	Santa Ana Detention Center 62 Civic Center Plaza Santa Ana, CA 92703
Mailing Address:	715 W. North Gate Lane, Apt. 7 Anaheim, CA 92805

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on: 3/13/00

Month / Day / Year

COUNSEL:

__ WITHOUT COUNSEL

However, the court advised defendant of the right to counsel and asked if defendant desired to have counsel appointed by the Court and defendant thereupon waived assistance of Counsel.

X WITH COUNSEL: Craig Wilke, DFPD

PLEA:

X GUILTY, and the Court being satisfied that there is a factual basis for the plea.

__ NOLO CONTENDERE — NOT GUILTY

FINDING:

There being a verdict of X GUILTY on __, defendant has been convicted as charged of the offense(s) of:
21 USC 846: Conspiracy to Possess with Intent to Distribute Methamphetamine (Count 1), Class A Felony

JUDGMENT AND PROBATION/COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

120 months. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years under the following terms and conditions: 1) The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318; 2) The defendant shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing as instructed by the Probation Officer. The defendant shall abstain from using illicit drugs, using alcohol, and abusing prescription medications during the period of supervision; 3) During the period of community supervision the defendant shall pay the special assessment in accordance with this judgment. 4) The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS), and if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. The defendant is not required to report to the Probation Office while residing outside the United States; however, within 72 hours of release from any custody or any reentry to the United States during the period of Court ordered supervision, the defendant shall report for instructions to the U.S. Probation Office, located at: Ronald Regan Federal Building and United States

Courthouse, 411 West Fourth Street, Suite 4170, Santa Ana, California 92701-4597. 5) The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name other than the defendant's true legal name, without the prior written approval of the Probation Officer; further, the defendant shall not use, for any purpose or in any manner, any name other than his true legal name.

Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived as it is found that the defendant does not have the ability to pay a fine.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 which is due immediately.

The court recommends to the Bureau of Prisons that the defendant be incarcerated in a California institution, but only in so far as this recommendation accords with security classification and space availability.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

_____This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed by : District Judge /s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER

It is ordered that the Clerk deliver a certified copy of the Judgement and Probation/Commitment Order to the U.S. Marshal or other qulified officer.

Sherri R. Carter, Clerk

Date/Filed 3/21/00 By /s/ D. Beard
Month / Day / Year D. Beard, Deputy Clerk

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.
[See attached Probation Officer's Guideline Summary from PSR]

OR

__ The court adopts the factual findings and guideline application in the presentence report except:
[See attached sheet for factual findings (different from PSR)]

Guideline Range Determined and Guideline Application by the Court (when different from PSR):

Total Offense Level: 29

__ Adjustments made to offense characteristics: _____;

Criminal History Category: III

__ Adjustments made to criminal history: _____;

Imprisonment Rage: 120 to 135 months

Supervised Release Range: 5 years

Fine Range: $ 15,000 to $ 4,000,000

X Fine is waived or is below the guideline range, because of defendant's inability to pay.

Restitution: $ N/A

____Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

____For offenses that require the total amount of loss to be stated, pursuant to Chapter 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the

payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

____ Partial restitution is ordered for the following reasons(s): _____.

Sentences within the Guideline Range

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines. OR

____ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): _____; OR

Departures: The sentence departs from the guideline range:

A. ____ upon motion of the government, as a result of defendant's substantial assistance.

__ Offense Levels/Criminal History Category(ies) as recommended by government;

__ Offense Levels/Criminal History Category(ies) because:

B.____ for the following reason(s):_____.

Supreme Court, U.S.
FILED
JAN 2 9 2004
OFFICE OF THE CLERK

No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Rules involved	2
Statement	3
Summary of argument	15
Argument:	
Respondent cannot show reversible plain error because the Rule 11 error at the guilty plea colloquy had no effect on his decision to plead guilty	19
I. A violation of Rule 11 does not constitute reversible plain error unless the defendant can establish that he would have persisted in his plea of not guilty if he had been given the omitted Rule 11 advice	19
A. A defendant who cannot show that he would have persisted in his plea of not guilty if he had been given the omitted advice cannot demonstrate that a Rule 11 error affected his substantial rights	20
1. This Court's decisions establish that an error affects substantial rights if it affected the outcome of the district court proceeding	20
2. The standards applied by the Ninth Circuit and the Eleventh Circuit are inconsistent with this Court's decisions	22
a. The Ninth Circuit's standard is erroneous	23
b. The Eleventh Circuit's standard is erroneous	28

TABLE OF CONTENTS—Continued:

	Page
B. A defendant who cannot show that he would have persisted in his plea of not guilty if he had been given the omitted advice cannot demonstrate that a Rule 11 error seriously affected the fairness, integrity, or public reputation of judicial proceedings	31
II. Respondent cannot establish that he would have persisted in his plea of not guilty if he had been given the omitted Rule 11 advice	34
Conclusion	39

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	30, 31
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	21
Brecht v. *Abrahamson*, 507 U.S. 619 (1993)	30
Halliday v. *United States*, 394 U.S. 831 (1969)	30-31
Hill v. *Lockhart*, 474 U.S. 52 (1985)	21, 22
Johnson v. *United States*, 520 U.S. 461 (1997)	17, 19, 30, 33
Jones v. *United States*, 527 U.S. 373 (1999)	20, 32
McCarthy v. *United States*, 394 U.S. 459 (1969)	17, 28, 30
Neder v. *United States*, 527 U.S. 1 (1999)	20, 30, 31
Peguero v. *United States*, 526 U.S. 23 (1999)	25
Strickland v. *Washington*, 466 U.S. 668 (1984)	22
United States v. *Atkinson*, 297 U.S. 157 (1936)	32
United States v. *Bejarano*, 249 F.3d 1304 (11th Cir. 2001)	28

Cases—Continued:

United States v. *Bell*, 776 F.2d 965 (11th Cir. 1985), cert. denied, 477 U.S. 904 (1986)	28
United States v. *Cannady*, 283 F.3d 641 (4th Cir.), cert. denied, 537 U.S. 936 (2002)	26, 36
United States v. *Chan*, 97 F.3d 1582 (9th Cir. 1996)	28
United States v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977)	25
United States v. *Coscarelli*, 105 F.3d 984 (5th Cir.), vacated, 111 F.3d 376 (5th Cir. 1997)	26, 36
United States v. *Cotton*, 535 U.S. 625 (2002)	17, 20, 30, 32
United States v. *Dayton*, 604 F.2d 931 (5th Cir. 1979), cert. denied, 445 U.S. 904 (1980)	28, 30
United States v. *Dixon*, 308 F.3d 229 (3d Cir. 2002)	22, 26, 27, 35, 36
United States v. *General*, 278 F.3d 389 (4th Cir.), cert. denied, 536 U.S. 950 (2002)	27
United States v. *Graibe*, 946 F.2d 1428 (9th Cir. 1991)	23-24, 38
United States v. *Hyde*, 520 U.S. 670 (1997)	5
United States v. *Johnson*, 1 F.3d 296 (5th Cir. 1993)	22, 30
United States v. *Kelly*, 337 F.3d 897 (7th Cir. 2003)	27, 37
United States v. *Kennell*, 15 F.3d 134 (9th Cir. 1994)	14
United States v. *Lyons*, 53 F.3d 1321 (D.C. Cir. 1995)	22
United States v. *Martinez*, 277 F.3d 517 (4th Cir.), cert. denied, 537 U.S. 899 (2002)	22, 27
United States v. *Martinez*, 289 F.3d 1023 (7th Cir. 2002)	22
United States v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003)	14, 23

Cases—Continued: Page

United States v. *Molina-Uribe*, 853 F.2d 1193 (5th Cir. 1988), cert. denied, 489 U.S. 1022 (1989) 27, 37
United States v. *Monroe*, No. 02-12981, 2003 WL 23005180 (11th Cir. Dec. 24, 2003) 23
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 21
United States v. *Morris*, 286 F.3d 1291 (11th Cir. 2002) 28
United States v. *Noriega-Millán*, 110 F.3d 162 (1st Cir. 1997) 22, 38
United States v. *Olano*, 507 U.S. 725 (1993) 16, 19, 20, 21, 22, 24, 30, 32, 33
United States v. *Peters*, No. 77-1700 (4th Cir. Dec. 22, 1978) 28
United States v. *Prado*, 204 F.3d 843 (8th Cir.), cert. denied, 531 U.S. 1042 (2000) 22
United States v. *Quinones*, 97 F.3d 473 (11th Cir. 1996) 23
United States v. *Raineri*, 42 F.3d 36 (1st Cir. 1994), cert. denied, 515 U.S. 1126 (1995) 27
United States v. *Thibodeaux*, 811 F.2d 847 (5th Cir.), cert. denied, 483 U.S. 1008 (1987) 26, 36, 38
United States v. *Timmreck*, 441 U.S. 780 (1979) 18, 31, 32, 33, 34
United States v. *Vaughn*, 7 F.3d 1533 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994) 22, 26, 35, 36
United States v. *Vonn*:
531 U.S. 1189 (2001) 12, 13
535 U.S. 55 (2002) 20, 28, 29, 34, 35
United States v. *Westcott*, 159 F.3d 107 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999) 22, 26, 35
United States v. *Young*, 470 U.S. 1 (1985) 33

Cases—Continued: Page

United States v. *Zickert*, 955 F.2d 665 (11th Cir. 1992) 23
Williams v. *United States*, 503 U.S. 193 (1992) 21

Statutes and rules:

21 U.S.C. 841(a)(1) 3, 4
21 U.S.C. 841(b)(1)(A)(viii) 5
21 U.S.C. 846 ..... 3, 4, 5, 6
28 U.S.C. 2255 33
Fed. R. Crim. P.:
Rule 11 (1966) 29
Rule 11 (1979) 29
Rule 11 ..... *passim*
Rule 11(b)(1)(H) 28
Rule 11(b)(1)(I) 28
Rule 11(b)(1)(K) 28
Rule 11(c)(1) (1983) 25
Rule 11(c)(1)(B) 3, 5
Rule 11(c)(2) 3
Rule 11(c)(3)(B) 3, 7
Rule 11(d)(2)(B) 26
Rule 11(e) (1989) 2
Rule 11(e)(1)(B) (1989) 5
Rule 11(e)(2) (1989) 7, 10, 13, 14
Rule 11(e)(2) advisory committee note (1979 Amendments) 38
Rule 11(h) 12, 13, 17, 24, 29
Rule 11(h) advisory committee note (1983 Amendments) 12, 16, 24, 25, 28, 30
Rule 32 25
Rule 32(e) (1996) 11
Rule 52 (1944) 3
Rule 52 3
Rule 52(a) (1944) 12
Rule 52(a) 20
Rule 52(b) (1944) 3
Rule 52(b) 12, 13, 19, 20
Rule 52 advisory committee note (2002 Amendments) . 3

Miscellaneous:	Page
United States Sentencing Guidelines:	
§ 2D1(b)(6)	6
§ 3C1.1	37
§ 3E1.1 comment. (n.2)	36-37
Ch. 5, Pt. A	6, 11, 37
§ 5C1.2(a)	6
§ 5C1.2(a)(1)	11
§ 5G1.1(c)(2)	11
Roger Traynor, *The Riddle of Harmless Error* (1970)	33

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 310 F.3d 1221. A prior opinion of the court of appeals (Pet. App. 21a-23a) that was withdrawn, and then partially reinstated, is unpublished but is reported at 30 Fed. Appx. 706.

JURISDICTION

The initial judgment of the court of appeals was entered on January 29, 2002. The subsequent judgment of the court of appeals was entered on November 25, 2002. A petition for rehearing was denied on May 6, 2003 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on August 4, 2003, and was granted

on December 8, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

1. At the time respondent pleaded guilty, Rule 11(e) of the Federal Rules of Criminal Procedure (1989), titled "Plea Agreement Procedure," provided, in relevant part, as follows:

> **(1) In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do * * * the following:
>
> * * * *
>
> **(B)** make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court[.]
>
> * * * *
>
> **(2) Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. * * * If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.[1]

2. At the time the court of appeals issued its decision, Rule 52(b) of the Federal Rules of Criminal Procedure (1944), titled "Plain Error," provided as follows: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[2]

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Central District of California of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. The court of appeals reversed respondent's conviction and remanded for further proceedings.

1. In early May 1999, a confidential informant (CI) working with law enforcement authorities contacted respondent and negotiated a purchase of several pounds of methamphetamine. On May 6, 1999, respon-

---

[1] The current versions of these provisions, which are substantively identical in relevant respects, are set forth in Fed. R. Crim. P. 11(c)(1)(B), (c)(2), and (c)(3)(B). The version of Rule 11 in effect at the time of the plea and the current version of Rule 11 are reproduced in their entirety at Pet. App. 37a-42a and Pet. App. 42a-47a, respectively.

[2] Six days after the court of appeals' November 25, 2002, decision, an amendment to Rule 52(b) took effect. The change is "stylistic only." Fed. R. Crim. P. 52 advisory committee note (2002 Amendments). The version of Rule 52 in effect at the time of the plea and the current version of Rule 52 are reproduced in their entirety at Pet. App. 42a and Pet. App. 47a-48a, respectively.

dent met with the CI and provided him with a sample of the drug. After the meeting, which was monitored by law enforcement agents, the CI made arrangements with respondent to buy a larger quantity. PSR ¶¶ 16-19.

On May 13, 1999, respondent and two co-defendants drove to a restaurant in Anaheim, California, where the methamphetamine was to be delivered to the CI. Respondent got out of the car with one of his co-defendants, who was carrying a plastic shopping bag, and the two men then got into the CI's car. Minutes later, agents conducting surveillance responded to the CI's signal and arrested respondent and his co-defendants. When the agents searched the co-defendant's shopping bag, they found a plastic bag and a shoe box, which collectively contained more than a kilogram of methamphetamine. PSR ¶¶ 20-27.

During a post-arrest interview, respondent admitted that he had sold methamphetamine to the CI on the two occasions described above. Respondent also provided information about where he had gotten the drugs and about his role and the role of his co-defendants. PSR ¶¶ 30-33.

2. On May 28, 1999, a grand jury in the Central District of California returned an indictment charging respondent and his co-defendants with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 1), and possession with intent to distribute 1,391 grams of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) (Count 2). J.A. 35-38. A conviction for an offense involving at least 500 grams of a mixture or substance containing methamphetamine is punishable by a minimum prison term of ten years and

a maximum prison term of life. See 21 U.S.C. 841(b)(1)(A)(viii), 846.

3. On September 8, 1999, approximately six weeks before trial was scheduled to begin, respondent sent the district court a letter requesting new counsel. J.A. 41, 43. The asserted basis for the request was that respondent's court-appointed lawyer had been encouraging him to accept a plea offer that he did "not feel [was] appropriate." J.A. 41. At a status conference on October 7, 1999, respondent advised the district court that "[t]he only thing I'm looking for is * * * a better deal"; acknowledged that he was seeking "a disposition of [his] case other than trial"; and added that "[a]t no time have I decided to go to any trial." J.A. 46-47. At the same conference, respondent's counsel confirmed that his client "doesn't want a trial." J.A. 51. The district court denied respondent's request for new counsel. J.A. 52-53.

4. On October 12, 1999, respondent executed a written, "type B," plea agreement, Pet. App. 26a-36a, in which he agreed to plead guilty to Count 1 of the indictment, *id.* at 26a. In a type B agreement, the government "agrees to recommend (or not oppose the defendant's request for) a particular sentence." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997).[3] The agreement contained a number of stipulations, including the stipulation that respondent should receive a two-level reduction in his offense level under the "safety valve" provisions of the Sentencing Guidelines. Pet.

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[3] At the time of respondent's plea, this type of agreement was described in Fed. R. Crim. P. 11(e)(1)(B) (1989). It is now described in Fed. R. Crim. P. 11(c)(1)(B).

App. 29a.[4] The parties, however, agreed only that respondent satisfied three of the five safety-valve criteria—no violence or possession of a weapon during the offense, no death or serious bodily injury from the offense, and no aggravating role or participation in a CCE—and specifically stated that there was "no agreement as to [respondent's] criminal history or criminal history category." *Id.* at 30a. The agreement also stated that, "[a]bsent a determination by the Court that [respondent's] case satisfies the [safety-valve] criteria * * * , the statutory mandatory minimum sentence that the Court must impose * * * is ten years [of] imprisonment." *Id.* at 27a. If respondent had received all the sentencing reductions outlined in the agreement, including the safety-valve reduction, his Guidelines range, based on an offense level of 27 and a criminal history category of I, would have been 70 to 87 months of imprisonment. See Sentencing Guidelines Ch. 5, Pt. A.

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[4] A defendant is entitled to a two-level "safety valve" reduction under Sentencing Guidelines § 2D1.1(b)(6) if the criteria set forth in Section 5C1.2(a) are met. Section 5C1.2(a), in turn, provides that a defendant convicted of certain drug offenses, including conspiracy under 21 U.S.C. 846, is to be sentenced "in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)." Those criteria are that (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant did not occupy an organizational, leadership, managerial, or supervisory role in the offense and was not engaged in a continuing criminal enterprise (CCE); and (5) the defendant truthfully provided complete information concerning the offense before sentencing.

In the plea agreement, the parties acknowledged that the stipulations "do not bind * * * the Court," Pet. App. 30a, which is "not a party to th[e] agreement and need not accept any of the [government's] sentencing recommendations or the parties' stipulations," *id.* at 33a. Paragraph 19 of the agreement included an expanded statement of the advice that was then required by Fed. R. Crim. P. 11(e)(2) (1989): that "the defendant * * * has no right to withdraw the plea" if "the court does not accept the recommendation or request" for a particular sentence.[5] Paragraph 19 stated that, "[e]ven if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute," respondent "cannot, for that reason, withdraw [his] guilty plea, and [he] will remain bound to fulfill all [his] obligations under this agreement." Pet. App. 33a-34a.

The agreement was signed by respondent, a Spanish translator, respondent's counsel, and the prosecutor. Pet. App. 34a-36a. In signing the agreement, respondent acknowledged that it had been read to him in Spanish (the language he "understand[s] best"); that he had "carefully discussed every part of it with [his] attorney"; and that he "underst[oo]d" and "voluntarily agree[d]" to its terms. *Id.* at 35a. The signature of respondent's counsel was preceded by an acknowledgment that he had "carefully discussed every part of th[e] agreement with [respondent]." *Id.* at 36a.

5. On October 13, 1999, respondent appeared for a change-of-plea hearing, J.A. 55-80, at which the district

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[5] In the current version of Rule 11, this required advice is found in subsection (c)(3)(B). It is identical in substance to the provision in effect at the time of respondent's plea.

court conducted the colloquy required by Fed. R. Crim. P. 11. At the beginning of the proceeding, the court said that it was going to ask respondent a series of questions "to make certain that you understand all of your rights, what the penalties are that you face, and * * * that your plea agreement is not binding on the Court when it comes time for sentencing." J.A. 56-57.

A substantial portion of the Rule 11 colloquy was a review of the plea agreement, J.A. 61-75, which was filed and thereby made part of the record, J.A. 11.[6] Before reviewing the agreement, the court emphasized that it "is not a party to th[e] plea agreement" and that "at this time no one has promised [respondent] or figured out what [his] sentence should be." J.A. 61. The court then asked, "As you stand here now, has anybody promised you what the actual sentence will be in your case?" *Ibid.* Respondent answered "[n]o." *Ibid.* The district court then confirmed that the signature on the agreement was respondent's, that respondent had signed the agreement the day before, and that the acknowledgment preceding respondent's signature was still accurate. J.A. 62-63.

After addressing the nature of the charge to which respondent was pleading guilty, J.A. 63-64, the court turned to the section of the plea agreement that covered potential penalties, J.A. 64-65. During the ensuing portion of the colloquy, the following exchange took place:

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[6] The plea agreement executed on October 12, 1999, was amended before the change-of-plea hearing on October 13. See J.A. 71-75. The amended portions of the agreement have no relevance to the issues in this case. The plea agreement reproduced in the appendix to the petition for a writ of certiorari is the amended version.

THE COURT: In the next section of the plea agreement, there is a discussion about the penalties that you face.

You are reminded that absent a determination by the Court that your case satisfies the * * * safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.

Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4 [of the agreement]?

THE DEFENDANT: Yes.

THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?

THE DEFENDANT: No.

THE COURT: So you realize the Court may give you a ten-year sentence or more, as provided for by law?

THE DEFENDANT: Yes.

THE COURT: Knowing that, do you still want to go forward with your guilty plea?

THE DEFENDANT: Yes.

J.A. 64. The court then confirmed that respondent's counsel had told respondent that his eligibility for the safety valve was "subject to the Court's determination." J.A. 65.

After addressing the factual basis for the plea, J.A. 65-67, and the constitutional rights that respondent was waiving by pleading guilty, J.A. 67-69, the district court turned to the section of the plea agreement that covered Sentencing Guidelines factors, J.A. 69-70. During the portion of the colloquy that followed, the court referred to the safety valve as a "possibility," J.A. 69, and asked respondent whether he understood that the "predictions" in the plea agreement were "not going to be binding on * * * the Court," *ibid.* Respondent answered "[y]es." *Ibid.* The court then noted that the parties had stipulated that three of the five safety-valve criteria were satisfied, *ibid.*, and again asked respondent whether he understood that "these stipulations are not binding on the Court," J.A. 70. Respondent said, "I do." *Ibid.*

Later in the hearing, the district court reminded respondent that paragraph 19 of the plea agreement outlined "the circumstances under which you may or may not be allowed to withdraw your guilty plea." J.A. 75. The court did not review that provision "word by word," however, *ibid.*, and made no further mention of the circumstances under which respondent would be able to withdraw his plea. In particular, the court did not comply with Rule 11(e)(2)'s requirement that the defendant be advised that he could not withdraw his plea if the court did not accept the parties' sentencing recommendations. Respondent did not object to the omission. See *ibid.*

At the conclusion of the hearing, the district court accepted respondent's guilty plea. J.A. 77. It found that respondent "understands the terms of the plea agreement which we have reviewed at some length," and that he "understands that the plea agreement is not binding upon the Court when it comes time for sentencing." *Ibid.* The court also found that respondent "understands each and all of his constitutional rights," that he "knowingly, intelligently, and voluntarily waived those rights," and that he "made his guilty plea freely and voluntarily." J.A. 79.

6. In the Presentence Report (PSR), the Probation Office concluded, contrary to the expectations of counsel, that respondent had three prior convictions and five criminal history points. PSR ¶¶ 70-92. The discrepancy between the Probation Office's conclusion and counsel's expectations was attributable to the fact that, when they negotiated the plea agreement, neither the prosecutor nor respondent's attorney was aware that respondent had two convictions under other names. J.A. 113-119. Because respondent had more than one criminal history point, he was not eligible for the safety valve. See Sentencing Guidelines § 5C1.2(a)(1). With an offense level of 29 and a criminal history category of III, respondent was subject to a Guidelines imprisonment range of 108 to 135 months. See *id.* Ch. 5, Pt. A. The statutory minimum prison term of 120 months, however, effectively became the low end of the applicable range. See *id.* § 5G1.1(c)(2).

When he received the PSR, and thereby learned that the Probation Office had calculated a sentence that exceeded the one contemplated by his plea agreement, respondent did not seek to withdraw his plea. See Fed. R. Crim. P. 32(e) (1996). Instead, he made a written sentencing submission in which he stated that he had "no material objections" to the PSR and agreed with the Probation Office's "recommendation that he be sentenced to the mandatory-minimum term of 120 months." J.A. 81-82.

On March 13, 2000, respondent appeared for sentencing. J.A. 104-122. At the sentencing hearing,

respondent complained about his attorney's representation, J.A. 109-114, but he did not express any desire to withdraw his plea and go to trial. Instead, respondent repeatedly stated that he accepted responsibility for his criminal conduct. J.A. 109-112. After ruling that it would not appoint new counsel, J.A. 112, 119, the district court sentenced respondent to 120 months of imprisonment, J.A. 119-121, 123-127.

7. On appeal, respondent contended that the district court had abused its discretion in denying his request for substitute counsel and that his attorney had provided ineffective assistance. Resp. C.A. Br. 21-37. He also claimed, for the first time, that the district court had violated Rule 11(e)(2) by failing to advise him at his change-of-plea hearing that he could not withdraw his plea if the parties' sentencing recommendations were rejected. *Id.* at 17-21. The government conceded that the court had not complied with Rule 11(e)(2), Gov't C.A. Br. 17, and acknowledged that, under then-existing Ninth Circuit precedent, the error was subject to harmless-error review under Fed. R. Crim. P. 11(h), *ibid.*[7] Noting this Court's recent grant of certiorari in *United States* v. *Vonn*, 531 U.S. 1189 (2001), the government took the position that plain-error review under Rule 52(b) (rather than harmless-error review

[7] At the time of appeal, Rule 11(h) provided that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Subsection (h) was added to Rule 11 to "make[] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568. At the time of appeal, Rule 52(a) provided that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The current versions of Rules 11(h) and 52(a) are identical in substance to the earlier versions.

under Rule 11(h)) should apply to forfeited claims of Rule 11 error, Gov't C.A. Br. 17 n.2, but argued that respondent was not entitled to relief even under the harmless-error standard, *id.* at 18-21.

On January 29, 2002, the court of appeals issued an unpublished decision in which it affirmed the denial of respondent's motion for substitute counsel and declined to address his ineffective-assistance claim, but agreed that the district court had violated Rule 11(e)(2) and held that the error was not harmless. Pet. App. 21a-23a. Although it concluded that respondent's guilty plea should be vacated and the case remanded to permit respondent to enter a new plea, *id.* at 22a, the court, on its own motion, stayed issuance of its mandate pending the decision in *Vonn*, *id.* at 21a.

On March 4, 2002, this Court issued its decision in *Vonn*, 535 U.S. 55, which included two holdings. The first was that forfeited claims of Rule 11 error are reviewed under the plain-error standard of Rule 52(b), rather than the harmless-error standard of Rule 11(h). *Id.* at 62-74. The second was that, in determining whether a district court's violation of Rule 11 is reversible error, a reviewing court is not limited to the plea transcript, but may consider other portions of the record (in that case, transcripts of two earlier proceedings). *Id.* at 74-76. The court of appeals subsequently withdrew its decision and directed the parties to file supplemental briefs addressing the effect of *Vonn*. See Gov't Supp. C.A. Br. 1.

8. On November 25, 2002, the court of appeals, this time by a divided vote, again vacated respondent's

conviction based on the Rule 11 violation and remanded for further proceedings.[8]

a. Applying the plain-error standard mandated by *Vonn*, Pet. App. 4a-5a, the majority determined that the district court's failure to comply with Rule 11(e)(2) was an "error" that was "plain," *id.* at 5a. Citing *United States* v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003), the majority then held that a plain error affects "substantial rights" if the defendant shows that "the court's error was not minor or technical" and that "he did not understand the rights at issue when he entered his guilty plea." Pet. App. 5a. The majority found that respondent had made both showings. It concluded that the error was not "minor or technical" because respondent's sentence "was substantially higher than the one for which [he] bargained." *Id.* at 6a. And it concluded that respondent did not understand his right to withdraw his plea despite paragraph 19 of the plea agreement. Quoting *United States* v. *Kennell*, 15 F.3d 134, 136 (9th Cir. 1994), the majority relied on what that decision had characterized as the "marked difference" between "being warned in open court by a district judge" and "reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of [the] plea," and held that "the reading of [a] plea agreement is not a substitute for rigid observance of Rule 11." Pet. App. 6a. The majority deemed "unpersuasive" the government's argument that *Vonn* had undermined *Kennell*, reasoning that,

[8] In a contemporaneous unpublished decision, the court of appeals unanimously reinstated, verbatim, that portion of its prior unpublished decision that addressed respondent's substitution and ineffective-assistance claims. Pet. App. 19a-20a.

although *Vonn* authorizes appellate courts to consider warnings given to the defendant at an earlier stage of the case, it does not address the issue of plea agreements. *Id.* at 7a.[9] The majority then concluded that it would exercise its discretion to remedy the Rule 11 error, in order to prevent the "miscarriage of justice" that would result if respondent were required to serve a sentence that exceeded the one he expected. *Id.* at 10a.

b. Judge Tallman dissented. Pet. App. 10a-18a. In his view, the "cumulative effect of [respondent's] signed plea agreement *and* the questions posed to [him] during the plea colloquy," *id.* at 11a, conclusively demonstrated that he "understood the binding nature of his guilty plea," *id.* at 12a, and thus that "no plain error attends his conviction and sentence," *id.* at 11a. The dissent criticized the majority for "elevat[ing] form over substance by looking only to see if the 'magic words' were spoken in the colloquy, while the Supreme Court tells us to apply the plain error rule to the record as a whole." *Id.* at 12a.

SUMMARY OF ARGUMENT

A defendant who raises a claim of Rule 11 error for the first time on appeal, but cannot show that he would have persisted in a plea of not guilty if he had received the advice omitted by the district court, cannot demonstrate reversible plain error.

I. Under the plain-error rule, a defendant cannot overturn a guilty plea based on a violation of Rule 11

[9] The majority also rejected the government's argument that, because the district court had informed respondent that it was not bound by the government's sentencing recommendation, he could not establish a lack of understanding that he could not withdraw his plea. Pet. App. 8a.

unless he can establish that the error had an effect on substantial rights. This Court's decisions make clear that, in both the harmless-error and the plain-error context, an error affects substantial rights if it was "prejudicial," which means that it "affected the outcome" of the district court proceeding in question. *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Accordingly, as nine courts of appeals have held, a violation of Fed. R. Crim. P. 11 has no effect on substantial rights unless it affected the defendant's decision to plead guilty.

The Ninth Circuit has departed from that approach and holds that a Rule 11 error affects substantial rights if it was not "minor or technical" and the defendant did not understand the right at issue at the time of his plea. That standard is unsound. The Ninth Circuit derived the first part of its standard from a statement in an advisory committee note that a guilty plea should not be overturned "when there has been a minor and technical violation of Rule 11 which amounts to harmless error." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1569. The same note states, however, that the meaning of "harmless error" is "left to the case law," *id.* at 1568, and the case law makes clear that an error does not affect substantial rights unless it affected the outcome of the proceeding. As for the second part of the Ninth Circuit's standard, while a defendant's awareness of the omitted advice is ordinarily a sufficient basis for finding that a Rule 11 error did not affect substantial rights, it is not necessary. A court may be able to conclude that the defendant would have pleaded guilty even if he was not otherwise aware of the omitted advice when, for example, the defendant never claimed that he would have gone to trial if the advice had been given, the

defendant made affirmative statements indicating that he was intent on pleading guilty, the defendant received a significantly reduced sentence in exchange for his plea, or the evidence was so strong that there is little likelihood that the defendant would have risked a guilty verdict at trial.

The Eleventh Circuit holds that a violation of Rule 11 that involves a failure to address one of the rule's three "core" concerns necessarily affects substantial rights. That approach is also unsound. The Eleventh Circuit's standard is based on the rule of automatic reversal established in *McCarthy* v. *United States*, 394 U.S. 459 (1969), but that rule was rejected in 1983 through the enactment of Fed. R. Crim. P. 11(h), which subjects all preserved claims of Rule 11 error to harmless-error review. Nor does a failure to comply with Rule 11 fall within the limited class of "structural" errors that can be corrected regardless of their effect on the outcome.

Even if a defendant can demonstrate that a Rule 11 error affected his substantial rights despite the fact that it did not affect his decision to plead guilty, such a defendant cannot show that the error satisfies the fourth requirement of the plain-error rule: that it had a serious effect on the fairness, integrity, or public reputation of judicial proceedings. This Court has held that the failure to charge an element of the offense in the indictment or submit it to the jury does not satisfy the fourth component of the plain-error rule when the evidence leaves no doubt about what the outcome of the grand jury proceeding or the trial would have been if the error had not occurred. See *United States* v. *Cotton*, 535 U.S. 625, 633-634 (2002) (grand jury); *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (trial). There is at least as much reason to apply that principle to Rule 11 errors, because society's interest in

finality has "special force" when a conviction is based on a guilty plea. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). Under the fourth requirement of plain-error review, a defendant should therefore not be entitled to overturn his guilty plea based on Rule 11 error when he would have entered the same plea even absent the error.

II. Respondent cannot demonstrate that he would have persisted in his plea of not guilty if the district court had advised him during the plea colloquy that he could not withdraw his guilty plea if the government's sentencing recommendation was rejected. Respondent has never alleged that he would have gone to trial if the omitted advice had been given. Indeed, statements that he made to the district court demonstrate the opposite. Moreover, even without the safety valve, respondent received a substantial reduction in his sentence by pleading guilty, and the overwhelming evidence of his guilt made the chances of acquittal low. Finally, although the district court did not advise respondent that he was bound by his plea if the court did not accept the parties' sentencing recommendation, it did advise him that it was not required to accept that recommendation. For all of those reasons, respondent cannot show that, but for the violation of Rule 11, he would have adhered to a not-guilty plea. The Rule 11 error, therefore, neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings.

ARGUMENT

RESPONDENT CANNOT SHOW REVERSIBLE PLAIN ERROR BECAUSE THE RULE 11 ERROR AT THE GUILTY PLEA COLLOQUY HAD NO EFFECT ON HIS DECISION TO PLEAD GUILTY

I. A VIOLATION OF RULE 11 DOES NOT CONSTITUTE REVERSIBLE PLAIN ERROR UNLESS THE DEFENDANT CAN ESTABLISH THAT HE WOULD HAVE PERSISTED IN HIS PLEA OF NOT GUILTY IF HE HAD BEEN GIVEN THE OMITTED RULE 11 ADVICE

Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under this rule, a court of appeals is required to reject a forfeited claim unless the defendant makes four separate showings. As this Court has explained:

> [B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

Johnson v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (citations and internal quotation marks omitted). As explained below, a defendant who raises a claim of Rule 11 error for the first time on appeal, but cannot show that he would have persisted in his plea of not guilty if he had received the advice omitted by the district court, cannot satisfy either the third or the

fourth requirement of the plain-error rule, and thus is not entitled to vacatur of his guilty plea.

A. A Defendant Who Cannot Show That He Would Have Persisted In His Plea Of Not Guilty If He Had Been Given The Omitted Advice Cannot Demonstrate That A Rule 11 Error Affected His Substantial Rights

1. This Court's decisions establish that an error affects substantial rights if it affected the outcome of the district court proceeding

In *United States* v. *Olano*, this Court held that an effect on substantial rights under the plain-error rule (Fed. R. Crim. P. 52(b)) has the same meaning that it has under the harmless-error rule (Fed. R. Crim. P. 52(a)). 507 U.S. at 734.[10] It ordinarily means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Ibid.* Accord, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 632 (2002). An error will be found to have had *no* effect on a defendant's substantial rights, therefore, if the outcome of the proceeding "would have been the same" if the error had not occurred. *Jones* v. *United States*, 527 U.S. 373, 402 (1999); *Neder* v. *United States*, 527 U.S. 1, 17 (1999).

The Court has applied that principle to various types of judicial proceedings, in both plain-error and harmless-error cases. Thus, an error in a grand jury

[10] Insofar as the "substantial rights" component is concerned, the only difference between the plain-error rule and the harmless-error rule is that the former requires the defendant to prove that the error had an effect on substantial rights while the latter requires the government to prove that the error did not have an effect on substantial rights. See *Vonn*, 535 U.S. at 62-63; *Olano*, 507 U.S. at 734.

proceeding is not prejudicial unless it "had an effect on the grand jury's decision to indict," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); an error at a detention hearing is not prejudicial unless it had an effect on the court's decision to order the defendant detained, see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); an error at trial is not prejudicial unless it "influenced the verdict," *Olano*, 507 U.S. at 740; accord, *e.g.*, *Neder*, 527 U.S. at 17 (trial error is not prejudicial if "the jury verdict would have been the same absent the error"); and an error at sentencing is not prejudicial unless it affected the sentence imposed, see *Jones*, 527 U.S. at 394-395; see also *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (sentencing error is not prejudicial if "the error did not affect the district court's selection of the sentence"). The same principle applies when the judicial proceeding is a hearing at which a defendant enters a guilty plea. When a defendant seeks to have his guilty plea vacated on the basis of a Rule 11 error, the error is not prejudicial, and thus does not affect substantial rights, unless it affected the defendant's decision to plead guilty.

While this Court has not previously had the opportunity to apply *Olano*'s standard to guilty pleas, there is nothing in either the holding or the logic of the decision to suggest that a plea proceeding should constitute an exception from the "district court proceedings," 507 U.S. at 734, whose outcome must have been affected for an error to have an effect on substantial rights. Indeed, in a different context, this Court has explicitly held that a violation of a defendant's rights in connection with a guilty plea does not result in "prejudice" unless it affected his decision to plead guilty. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), the

Court addressed the question whether a deficiency in the performance of counsel in advising the defendant to enter a guilty plea was sufficiently prejudicial to qualify as ineffective assistance of counsel under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Under the "prejudice" component of that test, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, "the result of the proceeding would have been different." 466 U.S. at 694. Applying *Strickland* in *Hill*, the Court held that the relevant inquiry is whether, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

2. The standards applied by the Ninth Circuit and the Eleventh Circuit are inconsistent with this Court's decisions

Consistent with the principle that an error affects substantial rights if it "affect[s] the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, nine of the eleven circuits to consider the question have concluded that a Rule 11 error affects substantial rights if the defendant would have persisted in a plea of not guilty had the error not occurred.[11] Only the Ninth

[11] See, *e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995); *United States* v. *Noriega-Millán*, 110 F.3d 162, 167 (1st Cir. 1997); *United States* v. *Westcott*, 159 F.3d 107, 112-113 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999); *United States* v. *Dixon*, 308 F.3d 229, 234 (3d Cir. 2002); *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.), cert. denied, 537 U.S. 899 (2002); *United States* v. *Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (en banc); *United States* v. *Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002); *United States* v. *Prado*, 204 F.3d 843, 846 (8th Cir.), cert. denied, 531 U.S. 1042 (2000); *United States* v. *Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994). While some of these

Circuit and the Eleventh Circuit apply a different standard. The standard in the Ninth Circuit, which it applied in this case (Pet. App. 5a), is that "a defendant's substantial rights are affected by Rule 11 error where the defendant proves that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." *Minore*, 292 F.3d at 1118. In the Eleventh Circuit, there is a *per se* rule that a violation of Rule 11 affects substantial rights, and requires reversal, if it involves a failure to address one of the rule's three "core" concerns or objectives: ensuring that the guilty plea "is free of coercion"; ensuring that the defendant "understands the nature of the charges against him"; and ensuring that the defendant "is aware of the direct consequences of the guilty plea." *United States* v. *Quinones*, 97 F.3d 473, 475 (11th Cir. 1996).[12] As explained below, the Ninth Circuit and Eleventh Circuit standards are erroneous.

a. The Ninth Circuit's standard is erroneous

In *Minore*, 292 F.3d at 1118-1119, the Ninth Circuit "borrow[ed]" the interpretation of the effect-on-substantial-rights component of the plain-error rule from a pre-*Olano* Ninth Circuit case, *United States* v.

decisions applied the plain-error rule, others applied the harmless-error rule.

[12] A number of Rule 11's requirements, including the one at issue here, have been found to address a "core" concern. See *United States* v. *Zickert*, 955 F.2d 665, 667-669 (11th Cir. 1992). When a Rule 11 error does not implicate a "core" concern, the Eleventh Circuit applies the majority rule: it reverses only if the defendant "would not have pled guilty had he been * * * fully apprised of his * * * right[s]." *United States* v. *Monroe*, No. 02-12918, 2003 WL 23005180, at *8 (11th Cir. Dec. 24, 2003).

Graibe, 946 F.2d 1428 (1991), that had reviewed a claim of Rule 11 error under the harmless-error rule. *Graibe* held that, under Rule 11(h), an error is harmless if (1) the error was "minor or technical" or (2) the defendant was aware of the omitted information when he entered his plea. 946 F.2d at 1433-1434.

Graibe, in turn, borrowed the "minor or technical" half of its standard from the advisory committee note accompanying Rule 11(h). See 946 F.2d at 1433. The language in the note on which the Ninth Circuit relied was that a guilty plea "should not be overturned * * * when there has been a minor and technical violation of Rule 11 which amounts to harmless error." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1569. But that language reflects only a recognition that a "minor and technical" violation of Rule 11 can be harmless error. It does not purport to define "harmless error" in general or an "effect on substantial rights" in particular. Indeed, the second sentence of the same advisory committee note explicitly states that Rule 11(h) "does not * * * attempt to define the meaning of 'harmless error,' which is left to the case law." *Id.* at 1568. The case law—in particular, this Court's decision in *Olano*—makes clear that, in both the harmless-error and the plain-error context, an effect on substantial rights means that the error "affected the outcome of the district court proceedings." 507 U.S. at 734. The advisory committee note in fact supports this view, since it cites with approval decisions that applied the harmless-error rule when the Rule 11 violation "could not have had any impact on the defendant's decision to plead." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568.

The other half of the Ninth Circuit's standard—that a Rule 11 error has no effect on substantial rights if the defendant was aware of the information omitted by the district court—is likewise inconsistent with the standard set forth in *Olano*, because it is too narrow. If the defendant was otherwise aware of the omitted information—because, for example, as in *Vonn*, he received the information at an earlier stage of the case—but nonetheless pleaded guilty, it will usually follow that the district court's failure to provide him with the same information during the plea colloquy did not affect his decision to plead guilty. Indeed, one of the advisory committee note's examples of a case in which a Rule 11 error is likely to be harmless is one in which "the judge's compliance with [Fed. R. Crim. P. 11(c)(1)(1983)] was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness of that element." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1569 (citing *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977)). Cf. *Peguero* v. *United States*, 526 U.S. 23 (1999) (defendant not prejudiced by district court's failure to comply with requirement of Fed. R. Crim. P. 32 that he be advised of right to appeal sentence, because defendant was aware of right).

But while awareness of the omitted advice is ordinarily a sufficient basis for finding that a Rule 11 error did not affect substantial rights, it is not necessary. As the courts of appeals have recognized, there are a variety of circumstances that, either alone or in combination, could lead a court to conclude that the defendant was determined enough to plead guilty that he would have done so despite not being otherwise

aware of the information omitted from the Rule 11 colloquy. One such circumstance is where, after becoming aware of the omitted Rule 11 information, the defendant did not seek to withdraw his plea on the ground that he would not have pleaded guilty if he had been aware of it before,[13] or where the defendant does not otherwise allege that that is so.[14] A second such circumstance is where the defendant made affirmative statements indicating that he was intent on pleading guilty.[15] A third is where the defendant received a

[13] See, *e.g.*, *Westcott*, 159 F.3d at 112 (if defendant "had been misled by the plea allocution, once he learned the [correct information] he surely would have asked the district court to permit him to withdraw his plea"); *Vaughn*, 7 F.3d at 1536 (because defendant "did not move to withdraw his plea at any time," he "fails to show that he would not have pled guilty if he had received the proper rule 11 warning"). A defendant may withdraw a guilty plea after the plea is accepted but before sentence is imposed if he can show "a fair and just reason" for the withdrawal. Fed. R. Crim. P. 11(d)(2)(B).

[14] See, *e.g.*, *Dixon*, 308 F.3d 235 (defendant "never clearly and unmistakably asserted that had he been correctly informed of the [omitted advice], he *would*, in fact, have pled not guilty and gone to trial"); *Vaughn*, 7 F.3d at 1536 (defendant "does not allege that he would not have entered a guilty plea if the court had given the proper warning"); *United States* v. *Thibodeaux*, 811 F.2d 847, 848 (5th Cir.) (defendant does not "allege that he would have withdrawn his plea had the district judge given the Rule 11(e)(2) warning"), cert. denied, 483 U.S. 1008 (1987).

[15] See, *e.g.*, *United States* v. *Cannady*, 283 F.3d 641, 648 (4th Cir.) (defendant's statements to district court demonstrated that defendant "did not want to go to trial under any circumstances"), cert. denied, 537 U.S. 936 (2002); *United States* v. *Coscarelli*, 105 F.3d 984, 996-997 (5th Cir.) (Jones, J., dissenting) (defendant's statement at sentencing demonstrated that he "had no intention of going to trial or asserting his innocence"), vacated, 111 F.3d 376 (5th Cir. 1997).

significantly reduced sentence in exchange for his plea.[16] And a fourth is where the evidence was so strong that the defendant is not likely to have taken the chance of being found guilty at trial and facing any lengthier sentence.[17] This list is meant to be illustrative, not exhaustive.[18]

[16] See, *e.g.*, *Dixon*, 308 F.3d at 235 (government agreed that defendant's offense level would be reduced and that no additional charges would be brought); *Cannady*, 283 F.3d at 648-649 (government "dropped three charges carrying substantial penalties" and "stipulated to drug quantities"); *United States* v. *General*, 278 F.3d 389, 395 (4th Cir.) (government "dropped an additional firearm charge, which would have carried a mandatory 25-year consecutive sentence"), cert. denied, 536 U.S. 950 (2002); *Martinez*, 277 F.3d at 532-533 (plea "reduced [the defendant's] potential exposure to prison by sixty years, reduced his financial exposure by $1.5 million, and required the Government to recommend that the court decrease his prison sentence").

[17] See, *e.g.*, *United States* v. *Kelly*, 337 F.3d 897, 905 (7th Cir. 2003) (in light of "overwhelming evidence of his guilt," defendant cannot show that correct Rule 11 advice would have "altered his decision-making calculus"); *United States* v. *Molina-Uribe*, 853 F.2d 1193, 1199 (5th Cir. 1988) (defendant's "knowledge that he would face overwhelming evidence of guilt in a trial * * * may well have motivated him to plead guilty in the hope of receiving consideration for having admitted his guilt"), cert. denied, 489 U.S. 1022 (1989).

[18] As Judge Boudin has observed, in some cases in which the omitted Rule 11 advice is related to sentencing, the question whether "the ultimate outcome [of the plea proceeding] would have been the same if the error had not been committed" is "not necessarily the proper [one]" to ask when reviewing the error under a harmless-error or plain-error standard. *United States* v. *Raineri*, 42 F.3d 36, 41-42 (1st Cir. 1994), cert. denied, 515 U.S. 1126 (1995). Even if the defendant in such a case "might not have pled guilty" if he had been provided with the omitted advice, the guilty plea should stand if "the actual punishment is no worse than what he was told." *Id.* at 42. For example, courts have held that a

b. The Eleventh Circuit's standard is erroneous

The Eleventh Circuit's "core concern" approach to Rule 11 error is derived from a 1979 Fifth Circuit decision, *United States* v. *Dayton*, 604 F.2d 931 (en banc), cert. denied, 445 U.S. 904 (1980). See, *e.g.*, *United States* v. *Bell*, 776 F.2d 965, 968 (11th Cir. 1985) (citing *Dayton*), cert. denied, 477 U.S. 904 (1986). *Dayton*, in turn, relied on *McCarthy* v. *United States*, 394 U.S. 459 (1969), a case decided by this Court at a time when Rule 11 was "relatively primitive." *Vonn*, 535 U.S. at 66. At that time, Rule 11 "consisted of but four sentences," Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568, and required

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district court's understatement of the maximum sentence, see Fed. R. Crim. P. 11(b)(1)(H), does not affect substantial rights when the sentence imposed is below the maximum erroneously identified during the plea proceeding. See Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568 (citing *United States* v. *Peters*, No. 77-1700 (4th Cir. Dec. 22, 1978)); *Raineri*, 42 F.3d at 42 (citing cases). Courts have similarly held that misinforming a defendant about supervised release, see Fed. R. Crim. P. 11(b)(1)(H), (I), does not affect substantial rights when the combined terms of imprisonment and supervised release that are imposed are below the maximum prison term of which he was advised. See *United States* v. *Bejarano*, 249 F.3d 1304, 1306-1307 n.1 (11th Cir. 2001) (citing cases). And courts have held that a district court's failure to make the defendant aware of its authority to order restitution, see Fed. R. Crim. P. 11(b)(1)(K), does not affect substantial rights if the amount of restitution ordered is less than the potential fine of which he was advised. See *United States* v. *Morris*, 286 F.3d 1291, 1293-1295 & n.2 (11th Cir. 2002) (citing cases). It has also been held that a district court's failure to advise the defendant that he could not withdraw his plea if the court did not accept the parties' sentencing recommendation is harmless error if the court did in fact accept the recommendation. *United States* v. *Chan*, 97 F.3d 1582, 1583-1584 (9th Cir. 1996).

only that a district court "determin[e] that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea" and that the court "satisf[y] [itself] that there is a factual basis for the plea," Fed. R. Crim. P. 11 (1966). As the Fifth Circuit observed in *Dayton*, *McCarthy* held that "'prejudice inheres' in failure to comply with Rule 11 in its form at the time of that opinion," and "all the rule then treated" were "absence of coercion, understanding of the accusation, and knowledge of the direct consequences of the plea." 604 F.2d at 939 (quoting 394 U.S. at 471). *Dayton* therefore held that "a failure by the trial court to address any one or more of the rule's three core concerns as occurred in *McCarthy* requires automatic reversal," while other violations of Rule 11, which had been expanded since *McCarthy* was decided, do not. *Id.* at 939-940.[19]

Dayton antedated the enactment of Rule 11(h), which was added in 1983 to "make[] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11" and to "reject[]" the "*McCarthy* per se rule" of "automatic reversal" for Rule 11 errors. Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568-1569. Automatic reversal was found to be "no longer" justified because (among other reasons) Rule 11 was "much simpler" when *McCarthy* was decided. *Id.* at 1569. By its terms, Rule 11(h) applies to any Rule 11 violation; unlike *Dayton*, it does not "distin-

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[19] By the time *Dayton* was decided, Rule 11 had assumed a form much like that of the current version. See *Vonn*, 535 U.S. at 69 (noting that Rule 11 was transformed into "detailed formula" in 1975). The version then in effect had seven subsections, two of which had multiple paragraphs, and it required district courts to provide a defendant with detailed advice before accepting a plea. See Fed. R. Crim. P. 11 (1979).

guish between *McCarthy*-type errors and others." 604 F.2d at 939. Recognizing that *Dayton* has been "supplanted by the 1983 addition of section (h) to Rule 11," the en banc Fifth Circuit repudiated that decision in 1993, and held that "no failure in the plea colloquy—* * * core or non-core—will mandate an automatic reversal of a conviction." *Johnson*, 1 F.3d at 298, 301. By adhering to *Dayton*'s rule of automatic reversal for certain categories of Rule 11 error, the Eleventh Circuit has overlooked the effect of Rule 11(h).

Since Rule 11 itself does not mandate automatic reversal for any type of violation, and since the meaning of an "effect on substantial rights" is "left to the case law," Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments), 18 U.S.C. App. at 1568, automatic reversal for Rule 11 errors that implicate a "core" concern can be justified only if such errors fall within "the 'limited class' of 'structural errors' that 'can be corrected regardless of their effect on the outcome.'" *Cotton*, 535 U.S. at 632 (quoting *Johnson*, 520 U.S. at 468-469, and *Olano*, 507 U.S. at 735)) (citations omitted). They do not fall within that limited class.

"Structural" errors are "fundamental constitutional errors" that "defy harmless-error review" because, instead of being simply "error[s] in the trial process itself," they "affect[] the framework within which the trial proceeds" and thus "infect the entire * * * process." *Neder*, 527 U.S. at 7-8 (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991), and *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993)). Rather than being "constitutionally mandated," the colloquy required by Rule 11 is intended to assist the district court in making "the constitutionally required determination" that the defendant's guilty plea is "truly voluntary." *McCarthy*, 394 U.S. at 465. Accord *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam) ("[A] large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11."). Since Rule 11 procedures are not of constitutional dimension, a "formal violation" of the rule is not a constitutional error, *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979), and *a fortiori* is not a "fundamental constitutional error[]," *Neder*, 527 U.S. at 7. Nor can a violation of one of the requirements of Rule 11 be said to "infect the entire [guilty plea] process." *Id.* at 8 (quoting *Brecht*, 507 U.S. at 630). Instead, such an error is "simply an error in the * * * process itself." *Ibid.* (quoting *Fulminante*, 499 U.S. at 310). For that reason, a district court's failure to provide a particular piece of advice required by Rule 11 is far removed from the small category of errors that have been held to be "structural." See *ibid.* (complete denial of counsel, biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, defective reasonable-doubt instruction).

B. A Defendant Who Cannot Show That He Would Have Persisted In His Plea Of Not Guilty If He Had Been Given The Omitted Advice Cannot Demonstrate That A Rule 11 Error Seriously Affected The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings

Even if the Ninth Circuit's narrow understanding of the third component of the plain-error rule were correct, the fourth component of the rule would preclude vacatur of a guilty plea when a Rule 11 violation had no effect on the outcome of the proceedings. In that circumstance, on the assumption that a plain Rule 11 error affected the defendant's substantial rights because the defendant was not aware of the omitted advice and the

error was not minor or technical, it would still be an abuse of discretion for the court of appeals to notice the error, because the error would not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

In *Johnson* v. *United States* and *United States* v. *Cotton*, the Court assumed, without deciding, that the failure to charge an element of the offense in the indictment (*Cotton*) or submit it to the jury (*Johnson*) satisfied the third requirement of the plain-error rule, but concluded that the error did not satisfy the fourth requirement, because the evidence supporting the omitted element was "overwhelming" and "essentially uncontroverted." *Cotton*, 535 U.S. at 633; *Johnson*, 520 U.S. at 470. The Court held that the omission did not seriously affect the fairness, integrity, or public reputation of the grand jury proceeding (*Cotton*) or trial (*Johnson*) because the evidence left no doubt about what the outcome of the proceeding would have been if there had been no error. See *Cotton*, 535 U.S. at 633-634 (grand jury "would have * * * found" omitted element, just as petit jury would have done in *Johnson*). The justification for applying that principle in this case may be even more compelling than in *Johnson* and *Cotton*, because "the concern with finality" has "special force with respect to convictions based on guilty pleas." *Timmreck*, 441 U.S. at 784.

The prosecution focuses considerable energy on preparing to prove its charges in the district court, and a guilty plea means that those preparations are no longer necessary. Victims and witnesses rely on the finality of the disposition, and the court system moves on to other business. A rule of procedure that freely allowed a defendant to escape his plea, long after its entry,

without having raised a claim of a Rule 11 violation in the district court, and without even claiming actual innocence of the charge, would not serve to vindicate the integrity, fairness, or public reputation of judicial proceedings. Indeed, such a rule would undermine those values, by potentially requiring the adjudication of criminal charges after memories have faded and witnesses have become unavailable.

Accordingly, the discretionary component of the plain-error rule should preclude reversal if a defendant acted knowingly and voluntarily in pleading guilty and the specific advice that the district court failed to provide would have been immaterial to the defendant's decision to plead. In those circumstances, there is no basis to conclude that a "miscarriage of justice" would result, *Olano*, 507 U.S. at 736 (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)), if the defendant is not allowed to withdraw his plea. Indeed, in *United States* v. *Timmreck*, which holds that a claim of a formal violation of Rule 11 is not cognizable in a collateral proceeding under 28 U.S.C. 2255, see 441 U.S. at 783-785, this Court explicitly found that such an error cannot have resulted in a "complete miscarriage of justice" when the defendant did not contend that, "if he had been properly advised by the trial judge, he would not have pleaded guilty," *id.* at 784.

As the Court observed in *Johnson*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." 520 U.S. at 470 (quoting Roger Traynor, *The Riddle of Harmless Error* 50 (1970)). A rule that would allow a defendant to enter a solemn plea of guilty knowingly and voluntarily and without raising any objections, and then, after sentence and entry of judgment, escape the effect of his plea because

of an error that is immaterial to his decision to plead guilty, would elevate minor flaws over substantial justice. That is not a rule that would command public confidence.

II. RESPONDENT CANNOT ESTABLISH THAT HE WOULD HAVE PERSISTED IN HIS PLEA OF NOT GUILTY IF HE HAD BEEN GIVEN THE OMITTED RULE 11 ADVICE

The district court failed to advise respondent that, if his prison term exceeded the one contemplated by his plea agreement, he could not withdraw his plea. This was a violation of an express requirement of Rule 11, and thus was an error that is plain. Because respondent did not object in the district court, it is his burden, as *Vonn* holds, to demonstrate that the plain error affected his substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. See 535 U.S. at 62-63. Respondent cannot make either showing, because, on this record, he cannot demonstrate that, if he had been given the omitted advice during the Rule 11 colloquy, he would have changed his mind about pleading guilty, terminated the change-of-plea hearing, and proceeded to trial.

In its petition for a writ of certiorari, the government asked the Court to decide whether a court of appeals may consider the terms of a written plea agreement in determining whether a Rule 11 violation constitutes reversible plain error. Pet. i (Question Two). The government argued (Pet. 23-26) that the Ninth Circuit's refusal to consider a plea agreement is inconsistent with *Vonn*'s holding that a court addressing a claim of Rule 11 error may look to "the entire record." 535 U.S. at 59. This Court's grant of certiorari, however, 124 S. Ct. 921 (2003), was limited to the question addressed

in this brief: whether, in order to show that a violation of Rule 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred. Pet. i (Question One). Because it denied certiorari on the former question, the Court might choose to assume, for purposes of deciding this case, that the Ninth Circuit's rule against considering plea agreements is correct. Even if his plea agreement is disregarded, however, respondent cannot demonstrate that he would have persisted in his plea of not guilty if the omitted Rule 11 advice had been given.[20]

First, as the Second Circuit has observed, if a defendant had truly been "misled into pleading guilty by the court's statement at the plea hearing," it stands to reason that, upon learning of the mistake, "he would have sought in the district court to withdraw his guilty plea and proceed to trial." *Westcott*, 159 F.3d at 113-114. Accord *Vaughn*, 7 F.3d at 1536. Respondent did not do so. See J.A. 10-18. Indeed, while he has made it clear that his first preference would have been the sentence contemplated by the plea agreement, respondent has not made "any affirmative representation[]" at any stage of the case, *Dixon*, 308 F.3d at 235, that his second preference would have been to go to trial and run the risk of a sentence that was even longer than the one he received. Since respondent has never even *alleged* that the Rule 11 error affected his decision to

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[20] If the plea agreement *is* considered, it is even clearer that respondent cannot make that showing, because the omitted information was set forth in the plea agreement, Pet. App. 33a-34a; respondent acknowledged that he understood the agreement, both when he signed it, *id.* at 35a, and when he entered his plea, J.A. 62-63; and the district court found, as a fact, that that was so, J.A. 77.

plead guilty, it is difficult to see how that fact could be found to have been *established*. See *ibid.*; *Vaughn*, 7 F.3d at 1536; *Thibodeaux*, 811 F.2d at 848.

Second, it is not merely the case that respondent has made no statement indicating that he would have gone to trial if there had been strict compliance with Rule 11; he *has* made statements indicating that he would *not* have gone to trial. At a pre-trial conference shortly before his guilty plea, respondent stated unequivocally that he was not interested in going to trial and was concerned only with obtaining the most favorable possible plea bargain. "The only thing I'm looking for," he said, "is * * * a better deal. * * * At no time have I decided to go to any trial." J.A. 46-47. Cf. *Cannady*, 283 F.3d at 648 (in light of defendant's statements, including statement that "I don't want to go to trial," he could not show that Rule 11 error affected decision to plead guilty). Even at his sentencing, after he had become aware that he would not be eligible for the safety valve and was therefore subject to the ten-year mandatory minimum, respondent stated that he had "always accepted responsibility" for his crime, J.A. 112, a sentiment that is not consistent with a desire to fight the charges. Cf. *Coscarelli*, 105 F.3d at 996-997 (Jones, J., dissenting) (in light of defendant's statements, including statement that "I take responsibility," he could not show that he would have gone to trial if omitted Rule 11 advice had been given).

Third, even without a safety-valve reduction, the Sentencing Guidelines provided respondent with a substantial incentive to plead guilty. If he had gone to trial and been found guilty, respondent would almost certainly have been ineligible for the stipulated (Pet. App. 29a) three-level reduction for acceptance of responsibility. See Sentencing Guidelines § 3E1.1, com-

ment. (n.2). Without that reduction, his prison term would have been anywhere from 31 to 68 months longer than the 120-month sentence he received. See *id.* Ch. 5, Pt. A (offense level 32 and criminal history category III). And if respondent had been found guilty after a trial at which he testified perjuriously, see *id.* § 3C1.1, his sentence could have been between 68 and 115 months longer. See *id.* Ch. 5, Pt. A (offense level 34 and criminal history category III).

Fourth, respondent was also unlikely to have risked going to trial because the chances of acquittal were low. Respondent was caught in the act of delivering more than a kilogram of methamphetamine and he confessed to the crime after he was arrested. PSR ¶¶ 16-33. "In light of th[is] overwhelming evidence of his guilt," respondent cannot show that receipt of the omitted Rule 11 advice would have "altered his decision-making calculus." *Kelly*, 337 F.3d at 905. Accord, *e.g.*, *Molina-Uribe*, 853 F.2d at 1199.

Finally, while the district court did not advise respondent that he would be unable to withdraw his plea if he did not get the sentence he expected, the court did advise him, repeatedly, that the sentencing stipulations in the plea agreement were not binding on the court, J.A. 56-57, 69-71, 77, and that he was facing a ten-year mandatory minimum sentence if it determined that he was not eligible for the safety valve, J.A. 64-65.[21] The primary purpose of the Rule 11 requirement with which

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[21] The court also advised respondent that it was "not a party to th[e] plea agreement," J.A. 61; confirmed that no one had promised respondent that he would in fact qualify for the safety valve, J.A. 64; stated that respondent's eligibility for the safety valve was "subject to the Court's determination," J.A. 65; and referred to the safety valve as a "possibility," J.A. 69.

the district court did not comply is to ensure that the defendant understands that his plea agreement "involves only a recommendation or request not binding upon the court." Fed. R. Crim. P. 11(e)(2) advisory committee note (1979 Amendments), 18 U.S.C. App. at 1563. Consistent with this purpose, the fact that the district court advised the defendant that it was not bound by the parties' sentencing recommendation has figured prominently in several decisions holding that there was no effect on substantial rights when the district court did not also say that the defendant was bound by his plea if the recommendation was not followed. See *Noriega-Millán*, 110 F.3d at 167-168 (citing cases).[22] There is particular justification for that result when, as in this case, the defendant "does not contend that he was under the impression that he could withdraw his plea if the judge did not follow the government's recommendation." *Thibodeaux*, 811 F.2d at 848.

[22] The Ninth Circuit disagrees with these decisions. See Pet. App. 8a (quoting *Graibe*, 946 F.2d at 1434-1435).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2004

(6)

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

No. 03-167

IN THE

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UNITED STATES OF AMERICA,
Petitioner,

v.

CARLOS DOMINGUEZ BENITEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR CARLOS DOMINGUEZ BENITEZ

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QUESTION PRESENTED

Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENTS	9
ARGUMENT	12
THE FAILURE TO FULLY ADVISE THE RESPONDENT THAT THE COURT WAS NOT BOUND BY THE RECOMMENDATIONS IN HIS PLEA AGREEMENT AND THAT HE COULD NOT WITHDRAW HIS PLEA IF HE DID NOT RECEIVE THE SENTENCE HE BARGAINED FOR, AS REQUIRED BY RULE 11(e)(2), RENDERS RESPONDENT'S GUILTY PLEA UNINTELLIGENT AND INVOLUNTARY AND ENTITLES HIM TO HAVE HIS PLEA VACATED	12
I. THE NINTH CIRCUIT'S PLAIN ERROR REVIEW OF A RULE 11 VIOLATION IS CORRECT, BECAUSE THE RESPONDENT MUST SHOW THAT THE GUILTY PLEA PROCEEDING DEPRIVED HIM OF A CONSTITUTIONALLY VALID PLEA	13
A. Fundamental constitutional principles are embodied in a valid guilty	17
1. Rule 11 is a proceeding designed to ensure that the district court generates constitutionally valid guilty pleas	18
B. Plain error review of a guilty plea when coupled with a negotiated plea agreement	25
1. The record	25

TABLE OF CONTENTS—Continued

	Page
II. THE GOVERNMENT'S ANALYSIS IS INCONSISTENT WITH CONSTITUTIONAL PRINCIPLES	28
A. The government misrepresents a split in the circuits	33
B. Practical impact of the government's analysis	35
III. BENITEZ WOULD HAVE PREVAILED EVEN UNDER THE GOVERNMENT'S PREJUDICE STANDARD AND HIS GUILTY PLEA MUST BE VACATED	37
CONCLUSION	39

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Boykin v. Alabama, 395 U.S. 238 (1969)	*passim*
Brady v. United States, 397 U.S. 742 (1970)	20, 21
Ellis v. United States District Court (In re Ellis), 294 F.3d 1094 (9th Cir. Wash., 2002)	23
Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680 (1993)	18
Henderson v. Morgan, 426 U.S. 637 (1976)	20, 21, 31, 38
Hill v. Lockhart, 474 U.S. 52 (1985)	29, 30
Iowa v. Tovar 2004 U.S. Lexis 1837 (March 8, 2004)	20
Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938)	18
Kercheval v. United States, 274 U.S. 220 (1927)	17, 21, 29
McCarthy v. United States, 394 U.S. 459 (1969)	19, 21
United States v. Cleary, 46 F.3d 307 (3rd Cir. 2001)	35
States v. Quinones, 97 F.3d 473 (11th Cir. 1996)	34
Strickland v. Washington, 466 U.S. 668 (1984)	29, 30
Torrey v. Estelle, 842 F.2d 234 (9th Cir.)	16
United States v. Benitez, 310 F.3d 1221 (9th Cir. 2002)	*passim*
United States v. Castro-Gomez, 233 F.3d 684 (1st Cir. 200)	34
United States v. Cotton, 535 U.S. 625 (2002)	31
United States v. DePace, 120 F.3d 233 (11th Cir. 1997)	34
United States v. Franco-Lopes, 312 F. 984 (9th Cir. 2002)	21
United States v. Hernandez-Fraire, 208 F.3d 945 (11th Cir. 2000)	33
United States v. Hyde, 520 U.S. 670 (1997)	21
United States v. Kraus, 137 F.3d 447 (7th Cir. 1998)	34

TABLE OF AUTHORITIES—Continued

Page

United States v. Livorsi, 180 F.3d 76 (2d Cir. 1999)..... 35
United States v. Marrero-Rivera, 124 F.3d 342 (1st Cir. 1997)..... 34
United States v. Noriega Millan, 110 F.3d 162 (1st. Cir. 1997)..... 16
United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)..... *passim*
United States v. Padilla, 23 F.3d 1220 (7th Cir. 1994)..... 34
United States v. Pierre, 120 F.3d 1153 (11th Cir. 1997)..... 34
United States v. Santo, 225 F.3d 92 (1st. Cir. 2000)..... 31
United States v. Timmreck, 441 U.S. 780 (1979) .. 28, 29
United States v. Vonn., 531 U.S. 1189 (2001)..... *passim*

FEDERAL STATUTES

Fed. R. Crim. P. 11 ..... *passim*
Fed. R. Crim. P. 52 ..... 13, 14
Fed. R. Crim. P. Rule 32..... 34

MISCELLANEOUS

Steven A. Drizin & Richard A. Leo, Police Induced Confessions in the Post-DNA Age, 82 N.C. L. Rev. (March, 2004)..... 23, 37
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TABLE OF AUTHORITIES—Continued

Page

Richard A. Leo and Richard J. Ofshe, The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation, 88 J. Crim. L. & Criminology 429(1998)..... 23, 37

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for the Ninth Circuit**

BRIEF FOR CARLOS DOMINGUEZ BENITEZ

STATEMENT OF THE CASE

On May 13, 1999 Benitez and two co-defendants were arrested for taking part in a conspiracy to sell meth-amphetamine to a confidential informant (CI). PSR 4. The CI, who was working with law enforcement authorities, contacted the respondent to initiate the sale. PSR16-27. At the time of his arrest, the respondent was in a state diversion program. PSR 13. He claimed that his involvement in the drug conspiracy was "prompted by despair" due to the fact that his wife had just given birth and "I hadn't paid for the rent and other food expenditures and bills." J.A 86.

On May 28, 1999, Benitez and his co-defendants were charged with two counts of conspiracy to possess with intent to distribute, and possession with intent to distribute, more than 500 grams of methamphetamine, in violation of 21 U.S.C. sections 846, and 841(a)(1), respectively. J.A. 35. Trial was initially set for July 20, 1999; per stipulation of the parties, the court continued the trial until October 19, 1999. J.A. 6.

On September 10, 1999, Benitez sent the district court a letter requesting the appointment of new counsel and expressing his dissatisfaction with the pressure he was under to sign a plea agreement. J.A. 41. This letter prompted the district court to hold a substitution of counsel hearing on October 7, 1999. At that hearing, the respondent explained to the court, through a Spanish interpreter, that he was not "familiar with the Articles of the Constitution" and believed he was being treated "unfairly". J.A. 46. The court noted that there was no communication or interaction between the respondent and his counsel. J.A. 48. The government, too, characterized the case as being "paralyzed". J.A. 49. Nevertheless, the court concluded that the respondent had competent counsel and did not see any grounds to remove his attorney. J.A. 52. The court then asked both parties about their trial readiness. Upon receiving affirmative responses, a trial date was set for October 19, 1999. J.A. 50-53.

On October 13, 1999, Benitez pleaded guilty pursuant to a negotiated plea agreement signed and filed the previous day. J.A. 74. The district court addressed him about the signatures in the plea agreement and asked in general terms if he understood the agreement that he had just signed. The court ascertained that there was a factual basis for the plea and cautioned the respondent regarding constitutional rights that he would be giving up if he persisted in his plea of guilty.

J.A. 66-68. The district court then explained the relevant sentencing factors and prospects of the respondent:

> THE COURT: This is based upon [defense counsel and the Assistant United States Attorney] study of the law and prediction about where your base offense level would come out, minus some credits for safety valve considerations, *which remains a possibility, apparently a strong one*, as well as acceptance of responsibility on account of your early guilty plea. J.A. 69.

(emphasis added).

Amendments to the plea agreement were made just before the change of plea hearing and clarification of these changes were discussed during the course of the hearing itself. J.A 71-75. While talking about the plea agreement alterations, the district court questioned the government on its position relevant to the safety valve. The government affirmed, "I think it's possible that he may qualify." J.A. 72.

Almost immediately after discussing the modifications in the plea agreement, the district court gave an incomplete Rule 11 (e)(2) warning. The court failed to mention that Benitez could not withdraw his guilty plea if the court did not follow the recommendations in the plea agreement:

> THE COURT: Now then, in the next section of your plea agreement, there is a discussion about who is and is not a party to the plea agreement and the circumstances under which you may or may not be allowed to withdraw your guilty plea. I won't review that word by word, but I will go to paragraph 21.

J.A. 75.

Nevertheless, the district court accepted the respondent's guilty plea. The court concluded that it was a "knowing", "intelligent" and "voluntarily" made plea. J.A. 77-79.

On January 31, 2000, Benitez appeared before the court for sentencing. The respondent indicated that he was not prepared for sentencing, that he felt "railroaded" into taking a plea, that he was still dissatisfied with his court appointed counsel, and that he had prepared a second letter for the court. The court suggested that the respondent have his counsel file the letter with the court. Respondent answered, "I want this letter to go to the Court, to the Court only, because I tried to send the letter to the Court through . . . my attorney, and he did not deliver it". J.A 94. In the second letter, the respondent stated, "I wanted to ask you for a new lawyer and when I had the chance to in court my lawyer whispered in my ear that I was not allowed to say anything to you or to speak openly with you" and "with me [sic] having a langue [sic] barrier I could not ask you if this were true". J.A. 98.

On March 3, 2000, Benitez filed a third request for new counsel with the court, stating that he never had proper legal representation; that he could not interact or communicate with his attorney; and that his attorney made him "get into a state of depression". In the third letter, the respondent stated that in regards to the underlying crime, "I never looked for anyone they came looking for me." J. A 102.

At the March 13, 2003 sentencing hearing, he once again expressed his dissatisfaction with his counsel, stating that he never had any knowledge or understanding about the points of responsibility, the safety valve or the laws, that he never hid anything from his attorney, and that "every time [my attorney] came to see me he treated me if I was the worst of the criminals". Respondent also stated, "really the crime that I committed, somebody sought me, I didn't look for the crime". J.A. 109-110.

At sentencing, the district court asked Benitez what counsel should have done differently in his case. The respondent replied: "[H]e could have explained to me from the beginning what is meant by the points, by the safety

valve, by everything. . . . I never knew about that." J.A. 112. The district court confirmed that the respondent had disclosed his criminal history to his counsel before entering his guilty plea but was nonetheless advised that he would qualify for the safety valve adjustment. J.A. 111. The court adopted the guideline calculations set forth in its previous tentative ruling and the PSR. J.A. 119. The respondent was sentenced to a 120-month term of incarceration, followed by five years of supervised release.

On appeal, the respondent raised a Rule 11(e)(2) error. He claimed that at the change of plea hearing the district court failed to give the proper Rule 11 warning that he could not withdraw his guilty plea if the sentencing recommendations set forth in his plea agreement were not adopted. In addition, the respondent raised a claim of ineffective assistance of counsel and challenged the district court's failure to substitute counsel. Resp. CA. Br. 21-37.

The government conceded that there had been a Rule 11(e)(2) error at the change of plea hearing and agreed that under Ninth Circuit precedent the harmless error standard set forth in Fed. R. Crim. P. 11(h) prevailed. Nevertheless, the government noted that this Court had granted certiorari in *United States v. Vonn*, 531 U.S. 1189 (2001) on a, "decidedly" similar issue which argued for a plain error standard of review. Gov't. C.A. Br. 17 n.2. The government argued that the respondent could not prevail under "plain error" scrutiny due to the signed plea agreement. It reasoned that the respondent had been on Rule 11(e)(2) notice that he could not withdraw his guilty plea if the court did not adhere to the sentencing recommendations because the warning was contained in the written plea agreement. Thus, argued the government, the respondent's substantial rights were not violated and plain error did not occur even though the court failed to warn him of this consequence in open court.

On January 29, 2002, the Ninth Circuit issued an unpublished memorandum holding that the district court had violated Rule 11(e)(2) and that the error was not harmless. Although Benitez's guilty plea was vacated and the case remanded to the district court to allow him to plead anew, acting *sua sponte*, the court of appeals agreed to stay the issuance of its mandate until this Court had decided *Vonn*. In the same memorandum, the court of appeals affirmed the lower court's denial to substitute counsel and declined to review the claim of ineffective assistance of counsel. Pet. App. 21-23 (a).

On March 20, 2002, the court of appeals issued an order withdrawing its previous decision and required both parties to file supplemental briefs on the impact of *United States v. Vonn*, 535 U.S. 55, which was decided on March 4, 2002. Pet. App. 19a.

On November 25, 2002, a divided Ninth Circuit panel issued its decision in a published opinion, *United States v. Benitez*, 310 F.3d 1221 (9th Cir. 2002), and once again vacated the respondent's guilty plea based on a Rule 11(e)(2) violation. Pet. App. 1a. The panel majority recognized that *Vonn* required a reviewing court to comply with Fed. R. Crim. P. Rule 52 "plain error" analysis when a Rule 11 argument is raised for the first time on appeal, and that the entire record became available for "consideration" to aid in that review. Pet. App. 7a.

The *Benitez* panel acknowledged that of the three types of plea agreements, the one the respondent entered into—a type B plea agreement—accorded such a "high degree of risk to the defendant" that the required Rule 11(e)(2) warning was of "critical importance". Pet. App. 4a. Citing this Court's plain error test in *United States v. Olano*, 507 U.S. 725, 732 (1993), the appeals court found that "there was no question that the district court erred" and that that error was "plain". Pet. App. 5a. Proceeding to the "substantial rights" prong of the *Olano*

test, the Ninth Circuit determined that the error was "not minor or technical' and that the respondent "did not understand the rights at issue when he entered his guilty plea". Pet. App. 5a.

The Ninth Circuit reiterated the constitutional principles underlying Rule 11(e)(2) as an "important safeguard designed to ensure that the plea is intelligent and knowing". Pet. App. 5a. The court of appeals determined that when a defendant obtains the sentence he bargained for then the Rule 11 error was "merely technical" and would not be "set aside". Since the respondent received a substantially higher sentence than the one he bargained for, the panel majority concluded that the district court's error was "neither minor nor technical". Pet. App. 6a.

The panel majority carefully considered whether respondents signed plea agreement might evidence an understanding of an omitted Rule 11 warning. However, the court of appeals ultimately rejected the government's argument that inclusion of the omitted warning in Benitez's plea agreement *conclusively* showed that he was aware of Rule 11(e)(2). In addition, the *Benitez* majority refused to rely on speculation as to whether the respondent understood the provision in the plea agreement:

> The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement.

Pet. App. 7a-8a.

The panel majority distinguished the respondent's case from that of the defendant in *Vonn*, who had been twice

informed of the omitted Rule 11 warnings in open court—at his initial appearance and at his arraignment. However, Benitez's situation was decidedly distinct in that he was *never* informed in open court of the omitted warning. Pet. App. 9a.

In this case, the court of appeals found that the written plea agreement did not "establish" that the respondent understood that he could not withdraw his guilty plea if he did not get the sentence that was recommended. *Id.* at 7(a). The court of appeals explained that reading "boiler plate language" in a plea agreement "during the hurried and hectic moments before court opens for taking a plea and arraignments is not a substitute for the rigid observance of Rule 11". Pet. App. 6a. The Ninth Circuit panel also emphasized the importance of the open court requirement embodied in the Rule 11 colloquy.

Furthermore, the court of appeals was not persuaded by the government's reasoning that the omitted Rule 11(e)(2) language was somehow inextricably intertwined in the colloquy statement that a sentencing court was not bound by the parties' recommendations in a plea agreement

Enforcing the constitutional prerequisites for a knowing and voluntary plea, the Ninth Circuit panel majority concluded that the respondent did not understand the consequences of his guilty plea due to not having received the Rule 11(e)(2) warning. The court of appeals recognized that because of the written plea agreement and the conduct of the prosecutor and defense counsel at the plea hearing, the respondent had the expectation of receiving the safety valve and a 12 to 33 month shorter sentence. Pet. App. 10a. The Ninth Circuit held that to hold the respondent to his plea would be a "miscarriage of injustice", since a plea is not truly voluntary unless "it is entered by one fully aware of the direct consequences of his plea." Pet. App. 10a.

Judge Tallman was the dissenting voice on the Ninth Circuit panel. Pet. App. 10a. It was his opinion that the signed

plea agreement, plus, the district court's colloquy proved that the respondent understood the omitted Rule 11 warning. The dissent focused exclusively on the state of the relevant record rather than on whether the respondent would have pleaded guilty if not for the omitted warning. Pet. App. 10a-18a.

On January 23, 2003, the government filed its petition for rehearing en banc. In the petition, the government asked the on the very same question that is before this Court. Government's Petition for Rehearing En Banc. On May 6, 2003, the Ninth Circuit issued its order denying the petition for rehearing en banc. Pet. App. 24a.

SUMMARY OF THE ARGUMENTS

Driven, apparently, by dissatisfaction with the outcome it achieved below, the government has invoked the jurisdiction of this Court under the guise of resolving a circuit conflict regarding the plain error standard in Rule 11 cases. Though the Ninth Circuit applied this Court's prevailing plain error standard to find that the respondent was prejudiced by the district court's serious Rule 11 error and that failure to correct the error would result in a fundamental miscarriage of justice, the government insists that the Ninth Circuit must be reversed because it failed to follow the government's preferred test for showing prejudice. In so doing, the government not only mischaracterizes the Ninth Circuit's holding below and elevates form over substance; it also ignores long settled Constitutional principles and contradicts the history and language of Rule 11.

The Ninth Circuit neither adopted a new plain error standard below nor deviated from this Court's precedent or the holdings of other circuit courts. Instead, the *Benitez* Panel applied the familiar three-prong plain error standard of *United States v. Olano*, 507 U.S. 725 (1993), requiring the respondent to establish (1) that there was error, (2) the error was plain, and (3) the error affected his substantial rights.

Respondent successfully demonstrated that the district court failed to advise him that he could not withdraw his guilty plea if he received a higher sentence than bargained for, that nothing in the record adequately cured that plain and undisputed error, and that he was prejudiced by receiving a significantly harsher sentence. The court of appeals found that these circumstances warranted the exercise of its remedial discretion to avoid a miscarriage of justice. This is the classic *Olano* analysis.

The government's insistence on a single-minded bright line test for establishing prejudice—that the *only* acceptable method for demonstrating prejudice under *Olano*'s "affects substantial rights" prong is to prove that "but for" the Rule 11 error the defendant would not have pled guilty—is contradicted by *Olano* and unsupported by the case law. *Olano* never required or endorsed any particular test for establishing prejudice and even noted that a showing of prejudice may not be required at all under some circumstances. *Id.* at 734-36. The Court's *Olano* opinion makes clear that it was not suggesting a bright line test applicable to every case, but was providing general guidelines for making prejudice determinations in those cases where a showing of prejudice was required. The closest the Court came to suggesting a standard of prejudice in *Olano* was its observation that, "in most cases," establishing prejudice will require showing that an error "affected the outcome of the district court proceedings." *Id.* Again, the Court was far from unequivocal on that point and certainly never endorsed the government's proffered "but for" test or suggested any particular method for showing that an error "affected the outcome."

Here, there is no doubt that the district court's Rule 11 error did affect the outcome of the respondent's case—he was sentenced to 12-33 more months than he bargained for without being forewarned by the district court that he could

not withdraw his guilty plea if he were sentenced to more than he bargained for. It would have been pointless for the Ninth Circuit under these circumstances to engage in a mechanical or protracted discussion about whether the outcome was affected. Instead, the Ninth Circuit held that the respondent could show his substantial rights were affected by showing "that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." Pet. App. at 5a. This approach is a perfectly acceptable method of satisfying *Olano*'s third prong, particularly where, as here, the prejudice is so abundantly obvious that it merits little or no discussion. The Ninth Circuit's approach is also consistent with *Olano*'s implicit recognition that courts have the flexibility to determine what degree of prejudice, if any, will be required in a given case. Finally, the Ninth Circuit's analysis is in keeping with fundamental constitutional safeguards and the underlying purpose of Rule 11 to ensure a defendant's guilty plea is made knowingly and voluntarily and with a full awareness of the consequences of that plea. The government's approach encroaches on bedrock constitutional safeguards by emasculating the "knowing" plea requirement. Also, consistent with Rule 11's and the Supreme Court's emphasis on the defendant's actual awareness and on correcting obvious errors that nullify important Rule 11 safeguards, the bright line prejudice test urged by the government would negatively impact the judicial process by virtually removing Rule 11 error claims from direct appellate review and banish them to the realm of collateral attack. This is because the government's prejudice test is almost impossible to meet.

Relegating Rule 11 claims to the dominion of a habeas proceeding would result in protracted evidentiary hearings for those defendants lucky enough to have one granted. How can defendants ever met this burden when the government totally ignores all indices that the defendant was unaware of the omitted Rule 11 warning? The government's efforts to

transfer serious Rule 11 challenges to the collateral proceeding area squarely conflicts with the Supreme Court holdings emphasizing the such claims are best addressed on direct appeal.

ARGUMENT

THE FAILURE TO FULLY ADVISE RESPONDENT THAT THE COURT WAS NOT BOUND BY THE RECOMMENDATIONS IN HIS PLEA AGREEMENT AND THAT HE COULD NOT WITHDRAW HIS PLEA IF HE DID NOT RECEIVE THE SENTENCE HE BARGAINED FOR, AS REQUIRED BY RULE 11(e)(2), RENDERS RESPONDENT'S GUILTY PLEA UNINTELLIGENT AND INVOLUNTARY AND ENTITLES HIM TO HAVE HIS PLEA VACATED

It is uncontested that the district court failed to advise Benitez at any time that he could not withdraw his plea if he did not get the sentence he bargained for. The government concedes that this failure violated Rule 11 of the Federal Rules of Criminal Procedure. The question raised by the government in this case is whether the *only* acceptable method for satisfying the plain error standard in Rule 11 cases is by proving that but for the Rule 11 error the defendant would not have pled guilty. The answer to that question is clearly no. As correctly demonstrated by the court of appeals below, the plain error standard may also be deemed satisfied where, as here, the record clearly shows that the outcome was seriously affected by Rule 11 error or that the defendant's guilty plea was not knowing and voluntary as required by the Constitution. The government's assertion that its speculative "but for" test is the only way one may establish reversible

plain error is contradicted by the history and language of Rule 11 and this Court's guilty plea jurisprudence.[1]

I. THE NINTH CIRCUIT'S PLAIN ERROR REVIEW OF A RULE 11 VIOLATION IS CORRECT BECAUSE THE RESPONDENT MUST SHOW THAT THE GUILTY PLEA PROCEEDING DEPRIVED HIM OF A CONSTITUTIONALLY VALID PLEA.

Because no objection was made by defense counsel to the Rule 11 violation that occurred during the plea colloquy, that Rule 11 error is deemed forfeited. Therefore the violation is reviewed under the plain error standard of Fed. R. Crim. P. 52(b), rather than under the Rule 11(h) harmless error provision. *See United States v. Vonn*, 535 U.S. 55 (2002). Applying Rule 52(b)'s authorization for reversible error, *United States v. Olano*, 507 U.S. 725, 733-734 (1993) established a three-prong test in which 1) there must be an error, 2) it must be plain, and 3) it must affect the defendant's substantial rights. If a substantial rights violation is found, a court of appeals may correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings".

According to *Olano*, an error affecting substantial rights means the same thing under Rule 52(a)'s harmless error or 52(b)'s plain error provision, "and in most cases it means that the error must have been prejudicial: it must have affected the outcome of the district court proceedings". The only difference between the two inquiries is who bears the burden of persuasion: under a harmless error analysis it is the

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[1] Counsel would like to acknowledge Monica Knox, Esq. for her assistance in the formulation of the respondent's merits brief.

government, while under plain error it is the defendant. *Id.* at p.734-735.

The extent to which a plain error analysis requires a showing of prejudice is a question *Olano* expressly reserved:

> We need not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial." *See* generally *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (constitutional error may not be found harmless if the error deprives defendant of the "'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair'") (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.

507 U.S. at 734-35.

In *Vonn*, this Court did not specifically articulate a substantial rights methodology but pursued an awareness analysis. *Vonn* held that although the defendant was not provided the required warning at the change of plea hearing, he was informed of the omitted Rule 11 advisement at two prior proceedings. *Vonn* determined that subsection (h)'s harmless error provision was inapplicable for a Rule 11 violation raised for the first time on appeal. Instead, *Vonn* held that Rule 52(b)'s plain error analysis was more appropriate.

Citing *Olano*, this Court in *Vonn* held that:

> When an appellate court considers an error that qualifies as plain, the tables are turned on demonstrating the substantiality of any effect on a defendant's rights: the defendant who sat silent at trial has the burden to show that his "substantial rights" were affected. And because relief on plain-error review is in the discretion of the reviewing court, a defendant has the further burden to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings. (Internal citations omitted).

Id at p. 62-63

With regard to the issue of the relevant record, *Vonn* held that under either a plain error or a harmless error analysis,"[a] reviewing court may consult the whole record when considering the effect of any Rule 11 error on substantial rights." *Id* .at 59 In *Vonn*, the district court failed to fully comply with the 11(c) requirement to inform the defendant of his right to counsel. Under a plain error analysis of the entire record, this Court concluded that Vonn's substantial rights were not violated because he was twice informed of this right in open court—at his initial appearance and at his arraignment.

Benitez's "awareness" analysis is consistent with this Court's decision in both *Olano* and *Vonn*. The Ninth Circuit held "[t]o show the district court's plain error affected his substantial rights; Benitez must prove that the court's error was not minor or technical, and that he did not understand the rights at issue when he entered his guilty plea." The Ninth Circuit found that the respondent had satisfied both of these elements and recognized that the omitted Rule 11 warning was of "critical importance" because it afforded "such a high degree of risk" to the defendant. "The warning required by Rule 11(e)(2) provides an 'important safeguard' designed to ensure that the plea is 'intelligent' and 'knowing,' and the omission of such warning is neither 'minor' nor 'technical.'

Since Benitez received a substantially higher sentence than the one he bargained for, the court's error was neither minor nor technical.

Regarding the second element, the Ninth Circuit rejected the government's argument that merely because the omitted warning was contained in the written plea agreement Benitez was aware of the right before entering a guilty plea. Instead, the court of appeals found that under the circumstances of this case, the plea agreement was not a sufficient substitute for the district court's obligation to satisfy the "open court" requirement of Rule 11. The court of appeals rejected the notion that a written plea agreement necessarily and conclusively cures Rule 11 errors. "If including the 'warning' in the plea agreement were sufficient to inform a defendant he could not withdraw his guilty plea, Rule 11(e)(2) would have little force". [2] This is especially true since Benitez could not read the warning. The court of appeals noted that he "had little incentive to do so" given that the government and counsel reinforced the expectation that Benitez would receive a lower sentence. Under these circumstances, the Ninth Circuit deemed it proper to exercise its discretion to correct the error:

> To hold Benitez to his guilty plea when he was not fully aware of the consequences of the plea would constitute a miscarriage of justice. *See Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988) ("A plea of guilty is voluntary only if it is entered by one fully aware of the direct consequences of his plea").

Pet. App. 10a.

[2] *See United States v. Noriega Millan*, 110 F. 3d 162 (1st. Cir. 1997) (The Supreme Court has stressed the importance in Rule 11 proceedings of direct interrogation of the defendant by the district court in order to facilitate the determination of the voluntariness of a defendant's guilty plea. *McCarthy v. United States*, 394 U.S. 459, 467 (1969). In addition, this court has repeatedly stated that the defendant's acknowledgement of a signed plea agreement or other written document will not substitute for Rule 11'srequirement of personal examination by the district court.

Contrary to the government's contention, the decision in *Benitez* is clearly consistent with the constitutional principles imbedded in Rule 11 and the jurisprudence of this Court. To determine the applicability of the petitioner's plain error analysis to a legally infirm guilty plea it is necessary to consider both the fundamental principles inherent in a constitutionally valid guilty plea and the evolution of Rule 11.

A. Fundamental Constitutional Principles Are Embodied In A Valid Guilty Plea Proceeding

In *Kercheval v. United States*, 274 U.S. 220, 224 (1927), this Court recognized the characteristics that distinguish a guilty plea proceeding. "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." If the government's statistics are correct, 95% of modern federal criminal convictions resulted from guilty pleas. That means that in the overwhelming majority of criminal cases the primary responsibility of district courts is to conduct the kind of plea hearing that is mandated by the Constitution and facilitated by Rule 11

Given the modern prevalence of guilty pleas, the U.S. criminal justice system has been reshaped and redefined. A judicial decree of "guilty" obtained through the protracted process of a jury trial is no longer a reality for most people convicted of federal crimes in the United States. This transformation to a predominantly plea-based system, by necessity elevates the constitutional demands and safeguards

placed upon plea proceedings.[3] *See Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680 (1993) (noting that "there is a 'heightened' standard for pleading guilty"). A natural consequence is that district court judges become the guardians of constitutionally sound guilty plea proceedings. *See Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019 (1938) ("This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.").

Before there is any discussion on whether the defendant would not have pleaded guilty but for the Rule 11 error, a reviewing court must make a threshold determination on whether or not the defendant entered into a constitutionally valid plea.

1. *Rule 11 Is A Proceeding Designed To Ensure That The District Court Generates Constitutionally Valid Guilty Pleas*

The importance of the role of the guilty plea in American jurisprudence inspired Congress to enact special, specific procedural rules for the taking of individualized pleas. Rule 11 went into effect in 1944 and has evolved into an exact proceeding designed to ensure that a guilty plea is a constitutionally valid one. The Advisory Committee Notes to Rule 11 (1966 Amendments) made clear that under a Rule 11 proceeding the court must determine that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

In *McCarthy v United States*, 394 U.S. 459, 465 (1969), this Court articulated the fundamental principals essential for

[3] Stephanos Bilbas, Judicial Fact-finding and Sentencing Enhancements in a World of Guilty Pleas, 110 YALE L.J. 1097 *(May 2001)

a valid guilty plea: "[A]lthough the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy* also made clear that a defendant's plea would be vacated if it were accepted by the district court "without fully adhering to the procedure provided for in Rule 11." *Id.* at 463-464. This Court has since watered *McCarthy* down, and has rejected a per se approach.

That same year, this Court decided another key guilty plea case, *Boykin v. Alabama*, 395 U.S. 238 (1969). *Boykin* is a state-based case, not specifically relate to a violation of Rule 11. This Court held there must be an "affirmative showing that the plea was both voluntary and intelligent". *Id.* at p. 241-242. Because Boykin addressed the validity of a state court guilty plea and thus did not involve Rule 11, it reaffirms that the source of the knowing and voluntary requirement for guilty pleas is the U.S. Constitution, not Rule 11. In addition, *Boykin* focused on whether a defendant was aware of the constitutional rights that he was waiving by pleading guilty: the right to a trial by jury, the right to confront one's accusers and the privilege against self incrimination. *Id.* 243-44.

Boykin held that a guilty plea is only constitutionally valid if the defendant, "has a full understanding of what the plea connotes and of its consequence." *Id.* at 244. Therefore, a constitutionally knowledgeable guilty plea is one that is made with a complete comprehension of the alternatives that are available. *Boykin* recognized that a defendant makes a valid decision to plead guilty only with full understanding, and by weighting the choices confronting him. "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality" *Id.* at 243.

The following year, in *Brady v. United States*, 397 U.S. 742, 748 (1970), this Court confirmed "that a guilty plea is a

grave and solemn act to be accepted only with care and discernment". *Brady* articulated a distinction between a voluntary plea and a knowingly, intelligently made plea and required both prerequisites be met. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748. A voluntary plea is made by a defendant who is fully aware of the consequences of his guilty plea; and with an understanding of the "actual value of any commitments made to him by the court, prosecutor, or his own counsel[.]" *Id.* at 755.

Most recently, this Court, citing *Brady*, reaffirmed that a waiver of the right to counsel at the guilty plea proceeding stage must be a "knowing, intelligent act done with sufficient awareness of the relevant circumstances". *Iowa v. Tovar*, 2004 U.S. Lexis 1837, 1839 (March 8, 2004). The issue in *Iowa v. Tovar* was "the extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation." *Id.* at 32 To determine whether the defendant would garner anything meaningful from the proffered advisement, the Court utilized an "enlightenment" inquiry but did not articulate a *per se* standard and noted that the states are free to accept any legal or legislative "guide" that may deem "useful". *Ibid.* This is contrary to what the government is urging this Court to adopt in a Rule 11 plain error prejudice test context.

In *Henderson v. Morgan*, 426 U.S. 637 (1976), this Court addressed the notion that the intelligence requirement for a valid guilty plea is an aspect of voluntariness. For example, a plea may be "involuntary" either because the accused does not understand the nature of the constitutional protection he is waiving or he has an incomplete understanding of the nature of the charges. *Id.* at p. 645 & n13.

The reasoning of *Kurcheval*, *McCarthy*, *Boykin*, *Brady*, and *Henderson*, plus the legislative fiats, make it apparent that Rule 11 is designed to aid the court in generating constitutionally valid guilty pleas. The holding in *Benitez* is consistent with this premise. The government's position, which postulates a standard whereby "any kind of guilty plea will do" as long as there is a motivated pleader, is contrary to the well reasoned precedents cited.

It is true that Rule 11's historical development has rendered the proceeding more complex than when *Kurcheval* was decided. This is due, in part, to the launching of plea agreements into judicial proceedings. The Advisory Committee Notes to Rule 11 (1974 Amendments) recognized the emerging significance of the plea bargaining system and its companion trend of using plea agreements as a viable defense to longer, harsher sentences, or having to defend against multiple charges.

Although in *United States v. Hyde*, 520 U. S. 670, 673 (1997), this Court examined Rule 32(e), the holding was based on an analysis of Rule 11 as the "principle provision in the Federal Rules of Criminal Procedure dealing with the subject of guilty pleas and plea agreements." The nature of plea agreements caused Congress to enact precise and detailed requirements for the introduction of these types of contracts into the criminal justice system. Plea agreements are contractual by nature and are measured by contract law standards. *See United States v. Franco-Lopes*, 312 F. 984, 989 (9th Cir. 2002)

Generally, in the orderly nature of the plea taking process, a guilty plea is entered pursuant to Rule 11 subsection (a). Before accepting the plea, subsection (c) specifies certain essential questions that the court must ask in open court. Under subsection (d), the court must address the defendant personally in open court and determine that the plea is

voluntary and not the "result from force, threats, or promises (other than promises in a plea agreement)".

> The prerequisites to accepting a guilty plea are set out in sections (c) and (d) of Rule 11. . . The opening words of these two sections are important: together, they speak of steps a district court must take "before accepting a plea of guilty," and without which it "shall not accept a plea of guilty." Based on this language, we conclude that once the court has taken these steps, it may, in its discretion, accept a defendant's guilty plea.

United States v. Hyde, 520 U.S. at p. 674

Next are the procedures governing plea agreements. A desire that the same constitutional principles be joined with plea agreements inspired Congress to create a particularized colloquy in the 1974 Amendments. The Advisory Committee Notes (1974 Amendments) identified the two principal objectives of a Rule 11 colloquy as: (1) ensuring the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into open court and setting forth the methodology for accepting the plea agreement. An amended Rule 11(e)(2) established three types of plea agreements and expressly required the court to inform the defendant of the consequences of entering into a particular type of plea agreement. Thus, the new provision necessitated an additional step in the colloquy procedure.

Most importantly for our purposes, is the type B plea agreement. Specifically, the court must advise the defendant that the recommendations in the plea agreement do not bind the court; and that the defendant will remain bound to his guilty plea if his sentence is not what was bargained for. Consequently, in a guilty plea proceeding coupled with a type B plea agreement, a district court judge is required to tell the

defendant not to ultimately rely on the plea agreement or any posturing, predictions or promises by his attorney or the prosecutor. By legislative enactment, the defendant is entitled to hear this advisement from the district court judge to facilitate the making of a knowing choice between alternatives and to prevent the kind of "coercion, inducement and threats" this Court warned about in *Boykin*.

The practical impact is that an open court warning allows the defendant to garner the information necessary to make a knowing choice between alternatives available to him. The verbal warning allows the defendant a moment to pause within the proceeding itself and reconsider his commitment to plead guilty—that grave and solemn act. Nothing in Rule 11 provides for or suggests that anyone other than the defendant may dictate or interfere with this choice. Unfortunately, defendants plead guilty for all kinds of reasons, only one of which is because they committed the crime charged.[4]

After hearing the Rule 11(e)(2) advisement, it becomes the defendant's *choice* whether to: i) stand by his plea and face a possible sentence at the highest end of the applicable guidelines range; or ii) withdraw his plea and attempt to renegotiate a different deal; or iii) withdraw his plea and take his chances at trial.[5] Having no opportunity to meaningfully assess the alternatives before a guilty plea is accepted places a

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[4] *See* Steven A. Drizin & Richard A. Leo, Police Induced Confessions in the Post-DNA Age, 82 N.C. L. Rev. (March 2004); Andrew Hessick and Reshman Saujani, Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge,1 BYU J. Pub. L. 189, 191 (2002); Richard A. Leo and Richard J. Ofshe , The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation, 88 J. Crim. L. & Criminology 429(1998).

[5] *See Ellis v. United States Dist. Court* (*In re Ellis*), 294 F.3d 1094, (9th Cir. Wash., 2002) en banc docket 01-70724.

defendant under a distinct procedural hardship. In order to withdraw a guilty plea after it is accepted but prior to sentencing a defendant must present a "just and fair reason", pursuant to Fed. R. Crim. P. Rule 32. This is a higher burden. The defendant must file a motion requesting permission to withdraw the guilty plea and then prove to the court there are sufficient grounds for granting that request.[6]

In 1975 several amendments were made to Rule 11 to insure that the voluntary and intelligent nature of guilty pleas were still of primary consideration. Most importantly, the 1983 Amendments to Rule 11 saw the inclusion of a harmless error provision derived from Rule 52(a). Subsection (h) states "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." The Advisory Committee Notes maintain that the change was necessary to eliminate appellate court's hypertechnical reading of *McCarthy's* automatic reversal for any Rule 11 error no matter how trivial or harmless the error may be. The provision does not attempt to define what is meant by "harmless error" as that is "left to the case law." The committee notes give an example of when an error is not harmless, as when "the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976).

The 1983 Amendments further caution that subdivision (h) makes no substantial changes to the role or "responsibilities" of a district court judge and "should not be read as supporting

[6] The 2002 Amendments to Rule 11 (d) specifically states that a defendant may withdraw a plea of guilty before the court accepts the plea, "for any reason or no reason".

extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards." In addition, Rule 11 should "not be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings."

The 1999 Amendments clarified the type B plea agreement. The Advisory Committee Notes state that this type of plea agreement is, "clearly of a different order than the other two" and the notes speaks to the magnitude of the Rule 11(e)(2) warning. The 2002 Amendments to Rule 11 were primarily stylistic.

The proceeding historical analysis confirms that Rule 11 was meant to ensure that a defendant's guilty plea was knowing and voluntary. This Rule 11 requirement facilitates the district court's determination that a guilty plea is constitutionally sound and emphasizes the critical importance of establishing a clear record.

B. Plain Error Review Of A Guilty Plea When Coupled With A Negotiated Plea Agreement

1. *The record.*

In *Boykin*, this Court recognized that due process requires an adequate record to demonstrate that a defendant's guilty plea was "intelligent and voluntary". 395 U.S. at p. 243. *Boykin* held that the record must affirmatively show that a defendant who pleads guilty "has a full understanding of what the plea connotes and of its consequences". *Ibid. McCarthy* elucidated the reason for a record, "Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding in this highly subjective area. The Rule contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset. 394 U.S. at p.470

In 1974, Congress specifically addressed the procedural requirements for a Rule 11 record. The Advisory Committee

Notes (1974 Amendment) to subsection (g) required a "verbatim record" be kept of the proceeding which included, "without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea".

Generally, under a harmless error inquiry the relevant record was thought to be limited to the guilty plea proceeding itself. In *Vonn*, *supra*, this Court had determined that the whole record was available for consideration in determining if a defendant's substantial rights were violated, under either a harmless error or plain error analysis. In that case, the Court found no reversible plain error because the defendant had been given the omitted warning several times in the course of the proceeding, including, most importantly, two times in open court. This Court recognized that *Vonn* had an opportunity to hear and read the warning. "The record shows that four times either *Vonn* or his counsel affirmed that *Vonn* had heard or read a statement of his rights and understood what they were". *Id.* at 75.

The *Vonn* decision thus did not address the circumstances presented here, when a defendant is never warned on the record or in open court of the important Rule 11 safeguards. *Vonn* does not expressly include a signed writing, standing alone without proof in a transcript, as a means of verifying what a defendant understood. Under a plain error review, *Vonn* is consistent with the legislative mandate for an "open court" recitation of the relevant warnings. *Vonn* does not say that a signed writing not supported by a transcript containing the advisement is sufficient.

The situation in the present case is decidedly distinct from that in *Vonn*. Benitez was never informed in open court regarding the omitted warning and *Vonn* was presented with

a document that he could actually read, whereas Benitez was not:

> The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement.

Pet. App. 7a-8a.

As previously stated, plea agreements are governed by contract law standards. This is not to say that federal criminal plea agreements are subject to state civil contract laws, but such contract standards are illustrative of how to understand the plea agreement. In Respondent's case, he entered into a negotiated contract in Los Angeles, California. California Civil Code section 1632 requires that "any person in the trade or business who negotiates in the Spanish language, either orally or in writing, in the course of entering into a contract or agreement. a loan or extension of credit . . . a lease, sublease, rental contract or agreement . . . shall, deliver to the party to the contract or agreement and prior to the execution thereof, an unexecuted Spanish-language translation of the contract or agreement" (California Civil Code, Part 2 Contract: Title 2: sections 1619-1633).[7] A party is exempt from the foreign language requirements if the consumer is accompanied by

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[7] Commencing on July 1, 2004, California Civil Code section 1632 will require that consumer lenders and retail businesses that negotiate specified transactions in a foreign language (primarily in Spanish, Chinese Tagalog, Vietnamese or Korean) must provide a copy of the contract translated into the respective language.

his own translator *who participates in negotiating* the transaction. *Ibid.*

Benitez was presented with a plea agreement written in a language he could not read or speak. His translator did not participate in negotiating in his plea agreement. In the context of a contract, therefore, the respondent's plea agreement would be declared legally invalid. Yet, it is the government's position that the plea agreement shows the respondent was aware of the omitted Rule 11 warning. The serious rights at stake and the consequences of a guilty plea demand more careful safeguards than a mere civil contract.

II. THE GOVERNMENT'S ANALYSIS IS INCONSISTENT WITH CONSTITUTIONAL PRINCIPLES

In *United States v. Timmreck*, 441 U.S. 780 (1979), the Rule 11 violation, at issue in that case was a failure to advise the defendant about the mandatory parole term. The Court addressed whether a collateral attack was the appropriate avenue for a Rule 11 violation raised for the first time. This Court held that a conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11. Such a violation is neither constitutional nor jurisdictional. The Court went on to explain that Rule 11 claims are best suited for direct appeal:

> Respondent could have raised his claim on direct appeal but did not, and there is no basis here for allowing collateral attack to do service for an appeal. . . . For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.

Id. at 784

Here, the government argues that the interest in finality justifies treating "forfeited" Rule 11 errors as not being

cognizable on direct appeal. Pet. Merits Br. 17-18; 32. This position is contrary to the holding in *Timmreck*, which actually encourages direct appellate review for these types of errors. More importantly, for our purposes, the petitioner's interpretation of *Timmreck's* prejudice test is incorrect. The government cites *Timmreck* for the proposition that it supports a singular prejudice test constituent with the proffered standard. *Timmreck* actually articulated a dual substantial rights analysis for a Rule 11 violation, rather than the single prejudice standard quoted by the government. This further supports the argument that the "affects substantial rights" test is not as restrictive as the one presented by the government. The Court noted in *Timmreck*, that "Respondent does not argue that he was *actually unaware* of the special parole term *or* that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule." *Ibid.* (emphasis added).

The government's position that a defendant can ***ONLY*** show "plain error" prejudice by proving that if not for the Rule 11 error he would have pled not guilty is also based on an incorrect interpretation of *United States v. Olano*. Moreover, to uphold what the petitioner is suggesting appears inconsistent with the holdings of *Kerchaval*, *McCarthy*, *Boykin*, *Brady*, and *Vonn*. Following the logic of those cases, a prejudicial effect on the outcome of a guilty plea proceeding occurs when there is a failure to generate a constitutionally valid guilty plea—a knowing and voluntary plea. The holding in *Benitez* is consistent with that rational.

The petitioner cites *Hill v. Lockhart* 474 U.S. 52 (1985), to support its vision of a defendant burdened with a plain error standard of proof. *Hill* concerned a claim of ineffective counsel when applied to a guilty plea proceeding. *Hill* held that under the prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show

that but for the erroneous advice of incompetent counsel he would have preferred to go to trial. The government "borrows" a line from *Strickland* and misapplies it to a Rule 11 violation. "Certainly our justifications for imposing the "prejudice" requirement in *Strickland v. Washington* are also relevant in the context of guilty pleas: The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence". *Hill v. Lockhart*, 474 U.S. at. 57

Any comparison between a Rule 11 violation to a claim that incompetent counsel advised a defendant to plead guilty is misplaced. These two different jurisprudential matters concern dissimilar interests. A prosecutor may not become involved in a guilty plea discussion involving an attorney and his client, however, prosecutors are fully capable of informing the district court that a portion of the Rule 11 colloquy has been overlooked. Indeed, they have perhaps the greatest incentive of all participants to do so. The advice to plead guilty is obviously distinct from the court's advisements about the guilty plea itself. Therefore, the resulting focus of inquiry should not be the same and the government's comparison to the *Strickland* standard is unhelpful at best. Certainly, Rule 11 imposes procedural safeguards even when a defendant is hampered with incompetent counsel. This is achieved by placing the Rule 11 constitutional requirements squarely on the shoulders of the district court judge.

Endorsing the misguided prejudice methodology offered by the government is tantamount to concluding that any guilty plea will do and unconstitutional pleas will suffice if a defendant is too ignorant (or yoked with incompetent counsel) to object to the Rule 11 errors at the plea hearing. According to the government, a probe into a defendant's awareness is not necessary. Appellate courts need only divine the mind and will of the defendant, presume he would have

chosen to plead guilty anyway, offer a reasonable rational assessment of the case and then summarily deny relief. The petitioner claims that avoidance of an actual subjective awareness inquiry is justified: as long as the defendant was motivated enough to plead guilty [8] or the defendant failed to file a motion to withdraw his plea in district court[9] or where there is overwhelming evidence of guilt, it is not essential to inquire if he was aware of the omitted advisement or the consequences of his guilty plea. Pet. Merits Br. at 26-27.

The notion that evidence of guilt will permit a disregard for an awareness inquiry was addressed by this Court in *Henderson v. Morgan*, *supra*. There, the court held that even if the prosecutor had overwhelming evidence of guilt and the defendant acted under the advice of competent counsel to plead guilty "a plea cannot support the judgment of guilty unless it was voluntary in the constitutional sense". 426 U.S. at 643-645. *United States v. Cotton*, 535 U.S. 625 (2002), is distinguishable on this point, as well. *Cotton* involved a jury trial that produced an extensive record in order to evaluate the evidence of guilt. This is nothing like the situation in *Benitez*.

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[8] As one state court observed nearly a century ago, '(r)easons other than the fact that he is guilty may induce a defendant to so plead, . . . (and) (h)e must be permitted to judge for himself in this respect.'" *North Carolina v. Alford*, 400 U.S. 25, 33, 91 S.Ct. 160 (1970) (quoting *State v. Kaufman*, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879).)

[9] *See United States v. Santo*, 225 F.3d 92, 97 (1st. Cir. 2000), "we note that Santo did not request to withdraw his guilty plea in the district court. This omission, however, is not necessarily fatal where a fundamental mistake in Rule 11 procedure is asserted. . . We have said, and reiterate, that a defendant who has not sought relief below "faces a high hurdle" on appeal, and must show that there was "a substantial defect in the Rule 11 proceeding itself." The First Circuit reversed the lower court's holding that the decision controverts the purpose behind Rule 11"to ensure that the defendant is not induced to change his plea because of a totally unrealistic expectation as to how mild a sentence he might receive."

The Advisory Committee Notes (1983 Amendments) warn against utilizing speculation aimed at "nullifying important Rule 11 safeguards". Nevertheless, decisions based on speculation are exactly what the petitioner postulates as providing good law or, rather, good enough law. The government prefers that the constitutional requirements for a valid guilty plea not mandate an awareness inquiry, and is asking this Court to adopt a singular and unconstitutional prejudice test.

In the present case, the government overlooks substantial evidence to the contrary to conclude that the respondent's plea was constitutionally valid. The *Benitez* Panel acknowledged that because the respondent was not aware of the omitted warning he could not communicate or interact with his attorney. The appeals court further found:

> The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement.

Pet. App. 7a-8a.

All of the above factors were omitted from the government's version of the case. Other than the signed plea agreement that contained the omitted Rule 11 (e)(2) warning, there is nothing in the record to support the government's position that the respondent's plea was constitutionally valid. Now, despite the fact that the Ninth Circuit expressly rejected its position on the ability of the written plea agreement to cure the district court's critical Rule 11 error, and despite the fact that this Court also rejected the government's request to

disturb the Benitez panel's decision on this point, the government persists in arguing that Respondent's guilty plea was knowing and voluntary *because of the written plea agreement!*

The petitioner also cites remarks made by the respondent that he wanted a "better deal" or that "at no time have I decided to go to trial" as proof that he never intended to go to jury trial. Those comments do nothing to cure the involuntary and unknowing nature of his plea. Nor do they establish Respondent's mind set at the time of the plea hearing. The government neglects to point out that defense counsel declared he was ready for trial and the respondent did not object or voice any opposition to establishing a trial date. J. A. 5-53.

Also, Respondent's remarks cited by the petitioner were all made prior to entering into a Rule 11(e)(2) type plea agreement. The record fails to show that when Benitez made the statements cited by the government he was aware of the consequences of the type of plea agreement he would eventually sign more than one month later. Therefore, the respondent's remarks about not deciding to go to trial are a red herring to draw the Court's attention away from the constitutionally infirm guilty plea.

A. The Government Misrepresents a Split in the Circuits

The petitioner substantiates its prejudice analysis by presenting it as the definitive standard of review prevailing in all but two the eleven sister-circuits. However, this is far from the truth. Not only does the Eleventh Circuit[10] require a

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[10] *See United States v. Hernandez-Fraire*, 208 F. 3d 945 (11th Cir. 2000) outlining the Eleventh Circuit's Rule 11 substantial rights analysis, which was based on deciding whether the three core concerns where violated; *United States v. Pierre*, 120 F.3d 1153, 1156 (11th Cir. 1997)("If

showing that one of the Rule 11 "core concerns" were violated to qualify for reversal, but the First [11] and the Seventh [12] follow the same reasoning. The three core concerns can be articulated as: 1) the guilty plea must be free of coercion; 2) the defendant must know and understand the nature of the charges; and 3) the defendant must know and understand the consequences of his guilty plea.

The petitioner characterizes those circuits relying on a "core concern" standard as "erroneous" and "inconsistent with this Court's decision" in *Olano*, Per. Merits Br. at 22-23. The inconsistency arises not from a conflict with *Olano*, but from the improperly limited and narrow interpretation the government associates with the third prong of *Olano's* "plain error" test. When the three core concerns are semantically dissected, one arrives at the constitutional principles for a knowing and voluntary plea, as articulated in *Kerchaval*,

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one of the core concerns is not satisfied, then the plea is invalid".); *United States v. DePace*, 120 F.3d 233, 236 (11th Cir. 1997)("A 'court's failure to address any one of these three core concerns requires automatic reversal.'"); *United States v. Quinones*, 97 F.3d 473, 475 (11th Cir. 1996) ("Failure to satisfy any of the core objectives violates the defendant's substantial rights.'").

[11] *See United States v. Castro-Gomez*, 233 F. 3d 684, 687 (1st Cir. 200) ("The complete failure of the district court to address one or more of the three concerns would warrant reversal."); *United States v. Marrero-Rivera*, 124 F.3d 342, 348 (1st Cir. 1997) ("A total failure to address any 'core concern' mandates that the guilty plea be set aside.")

[12] *See United States v. Kraus*, 137 F.3d 447, 458 (7th cir. 1998) ("Judicial participation in plea negotiations implicates one of the core concerns of Rule 11. . . and vacating a plea and sentence that may have been affected by such participation best serves the prophylactic purpose of the rule."); *United States v. Padilla*, 23 F.3d 1220, 1222 (7th Cir. 1994) (explaining that ignorance about the mandatory minimum penalties, a core concern, "strikes us an informational lack so serious that unless strong indications to the contrary are apparent from the record a court should presume it influenced a defendant's decision to plead guilty.")

McCarthy, *Boykin*, *Brady* and *Vonn* and a myriad of other federal decisions.

Contrary to the government's argument, the Second [13] and Third Circuit [14]do not exclusively follow the government's proffered substantial rights analysis either. The Third Circuit recognizes a dual standard of review consistent with this Court's holding in *Timmreck* where "the defendant must show that he was prejudiced by the error, i.e. that he did not understand the consequences of his plea *or* that, if he had been properly advised about the effect of the special parole, he would not have pled guilty." (emphasis added). The petitioner totally ignores the "understanding" reference in the quote. Pet. Merits Br. at 33.

B. Practical Impact Of The Government's Analysis.

Rule 11 instructs us that a primary function of the district court's colloquy is to develop a record showing that the constitutional principles for a knowing and voluntary guilty plea were met. However, as that colloquy formula stands today, it does nothing to show whether a defendant would prefer to go to trial due to a Rule 11 error. The result is an inadequate record. Therefore, the practical impact of the petitioner's plain error substantial rights analysis is twofold. The first impact is that it virtually removes Rule 11 issues from direct appellate review. In so doing, it relegates these types of claims to collateral attack where such claims are doomed under *Timmreck*.

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[13] *See United States v. Livorsi*, 180 F.3d 76, 81 (2d Cir. 1999) ("As the existence of Rule 11(e)(2) itself indicates, the best way to ensure that a defendant is fully aware of the implications of his decision to plead guilty is, after all, for the district judge to give the proper warning in open court").

[14] *See United States v .Cleary*, 46 F.3d 307 (3rd Cir. 2001).

Burdening criminal defendant's with the practically impossible task of proving that they would have proceeded to trial if not for the Rule 11 error will result in protracted evidentiary hearings in a habeas proceeding where the standard is higher and witnesses' memories are faulty. The government's analogy to claims of ineffective counsel is exactly on point. *Strickland* is a collateral review case based on a conviction by way of a guilty plea. In *Strickland*, the defendant was granted an evidentiary hearing for the specific purpose of expanding the existing record. Although the district court denied the defendant's petition for habeas corpus, nevertheless, a sufficient record was developed for the court of appeals to reverse, and for this Court to reverse the court of appeals stating:

> Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. *The record makes it possible to do so. Id.* at 698 (emphasis added)

Similarly, *Boykin*, *Brady*, and *Timmreck* are collateral review cases where the defendants pled guilty and then challenged the validity of their respective plea proceedings. Therefore, the jurisprudential realm of petitions for habeas corpus will be the ultimate fate for most Rule 11error claims, if this Court adopts the standard proffered by the government. Surely such venerable and inviolate principles of constitutional law as a knowing and voluntary guilty plea are deserving of a nobler fate.

The second impact of adopting the petitioner's standard is that speculation replaces certainty. Speculation is tolerated when the legislative enactment for creating an adequate plea colloquy in the first instance has not been established. Simply speaking, as Rule 11 appears today, district courts are not equipped to even ask the right questions to enable the development of the kind of record the government says would

be needed to satisfy it prejudice test. Indeed, an inquiry of this sort is not a part of any judicial proceeding. Given that Rule 11 is a procedural tool, it has not been legislatively honed to generate a colloquy sensitive enough to allow most defendants to meet this standard without an evidentiary hearing. The right of direct appeal does not offer relief in the form of an evidentiary hearing but collateral review does.

There is a structural disconnect between what is inherent in the current guilty plea proceeding and the proof required to meet the government's standard. In order to bridge the gap, the petitioner contends that an awareness analysis is not necessary. This contention encourages speculation. The justification for not pursuing a "knowing" analysis is that a defendant was motivated enough to plead guilty, despite a Rule 11 error. This scenario does not take into account that defendants who falsely confess and plead guilty are motivated pleaders.[15]

III. BENITEZ WOULD HAVE PREVAILED EVEN UNDER THE GOVERNMENT'S PREJUDICE STANDARD AND HIS GUILTY PLEA MUST BE VACATED

The respondent was not required to establish that absent the Rule 11 violation he would not have pleaded guilty. Nevertheless, he would have prevailed in the court of appeals under the prejudice standard proffered by the government. First, the record shows that Benitez was ready to go to trial; he felt "railroaded" into signing his plea agreement; he expressed confusion about the consequences of his guilty plea due to the lack of information provided to him; and he moved to withdraw his plea through the direct appeal process.

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[15] *See* the false confession articles by leading experts: Steven A. Drizin & Richard A. Leo, supra; Richard A. Leo and Richard J. Ofshe, *supra;* and Andrew Hessick and Reshman Saujani, supra. at footnote 4.

Second, the *Benitez* record is adequate due to the individualized, *pro se* actions of the respondent. He explained that he was not familiar with the United States Constitution; he wrote letters and had them delivered directly to the district court judge. The respondent's own initiative is the only reason why there is a sufficient record in this case. The problem is that other defendants may not be as courageous as the respondent is.

Third, in *Henderson v. Morgan, supra,* this Court briefly addressed a guilty plea situation where the record also suggested a possible defense. The issue in *Henderson* was "whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense". *Id.* at 638. Under a harmless error analysis, the defendant's guilty plea was found to be involuntary. Although, the Court "assume[d] that the defendant would have "probably plead guilty anyway" if he had been properly advised about the intent element, "[s]uch an assumption is, however, an insufficient predicate for a conviction of second-degree murder. *Id* at 644 n.12. Furthermore, the Court cautioned that because of the defendant's "unusually low mental capacity" there might have been a defense to the murder charge. *Id.* at 647. In this case, the Ninth Circuit did not dispute that Benitez might have had a defense but that, "[i]n his letters and statements to the court, Benitez never alleged [defense counsel] was failing to investigate an entrapment defense." Pet.App. at 23a.

Plainly speaking, when a court exercises caution and fails to exercise in assumptions or speculation, a fair and just result is achieved. A result produces trust when a citizen can say of the law, "first, the law was properly enacted, second, I can understand it and third, it was properly applied". Benitez takes issue with both the second and third prong—he did not understand the law, and the law was not properly applied in

his case. The Congress has made an explicit protocol for Rule 11 information transmittal, with the express purpose of making sure a defendant's plea is voluntary and he knows the consequences of pleading guilty. Here, that machinery broke down, the government does not deny the district court judge made an error and the Ninth Circuit declared the error to be of constitutional proportions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 03-167

Supreme Court, U.S.
FILED
APR 13 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

		Page
I.	This case does not involve an unconstitutional guilty plea	2
II.	The Ninth Circuit's standard is erroneous	4
	A. The Ninth Circuit's standard is inconsistent with this Court's decisions	4
	B. There is no meritorious practical objection to the standard applied by the majority of circuits	8
III.	Respondent cannot establish that he would have persisted in his plea of not guilty if he had been given the omitted Rule 11 advice	12

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	5
Boykin v. *Alabama*, 395 U.S. 238 (1969)	3
Brecht v. *Abrahamson*, 507 U.S. 619 (1993)	5
Halliday v. *United States*, 394 U.S. 831 (1969)	4
Henderson v. *Morgan*, 426 U.S. 637 (1976)	3
Hill v. *Lockhart*, 474 U.S. 52 (1985)	6, 13
Johnson v. *United States*, 520 U.S. 461 (1997)	5
McCarthy v. *United States*, 394 U.S. 459 (1969)	4
Neder v. *United States*, 527 U.S. 1 (1999)	5
Strickland v. *Washington*, 466 U.S. 668 (1984)	6
United States v. *Cotton*, 535 U.S. 625 (2002)	5
United States v. *Gandia-Maysonet*, 227 F.3d 1 (1st Cir. 2000)	11
United States v. *Olano*, 507 U.S. 725 (1993)	4, 5, 10
United States v. *Reyes*, 300 F.3d 555 (5th Cir. 2002)	10
United States v. *Rose*, 357 F.3d 615 (6th Cir. 2004)	11, 12

Cases—Continued: Page

United States v. *Timmreck*, 441 U.S. 780 (1979) 3-4
United States v. *Vaughn*, 7 F.3d 1533 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994) 15
United States v. *Vigneau*, 187 F.3d 70 (1st Cir. 1999), cert. denied, 528 U.S. 1172 (2000) 10
United States v. *Vonn*, 535 U.S. 55 (2002) 7, 8, 9
United States v. *Westcott*, 159 F.3d 107 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999) 15

Constitution, statutes, rules and regulation:

U.S. Const. Amend. VI 7
21 U.S.C. 841(b)(1)(B) 12
21 U.S.C. 846 12
Fed. R. Crim. P.:
Rule 11 ..... *passim*
Rule 32(d) 15
Rule 32(e) 15
Rule 52(b) 7
United States Sentencing Guidelines § 2D1.1 12

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UNITED STATES OF AMERICA, PETITIONER

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CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent defends the court of appeals' judgment, which vacated his conviction based on a Rule 11 violation in the taking of his guilty plea, on three alternative grounds. He contends that the court of appeals properly vacated the conviction because his guilty plea was unintelligent and involuntary; he contends that the standard applied by the court of appeals to find prejudice from a Rule 11 error (that the error was not minor or technical and the defendant did not understand the right at issue when he entered his plea) is correct; and he contends that he would prevail even under the government's standard because the record shows that he would have persisted in his plea of not guilty if there had been no Rule 11 error.

As explained below, each of these contentions is without merit. There was no constitutional violation in this case; the Ninth Circuit's standard for plain-error review of a Rule 11 error is incorrect; and respondent

cannot prevail under the correct standard. The Court should hold that, when a violation of Rule 11 is raised for the first time on appeal, the defendant cannot meet his burden to establish reversible plain error unless he can show that, but for the Rule 11 error, he would not have pleaded guilty—a burden that respondent cannot carry.[1]

I. THIS CASE DOES NOT INVOLVE AN UNCONSTITUTIONAL GUILTY PLEA

Respondent contends that his guilty plea was unintelligent and involuntary, and therefore "constitutionally infirm." Br. 32-33. Accord Amicus Br. 17-18. Respondent is mistaken.

As an initial matter, this contention goes beyond the issue that was resolved by the court of appeals and on which certiorari was granted. The court of appeals held that respondent's plea was taken in violation of Rule 11 of the Federal Rules of Criminal Procedure, not that it was taken in violation of the Constitution. See Pet. App. 5a-10a. Contrary to respondent's assertion, moreover, the court did not "declare[] the [Rule 11] error to be of constitutional proportions." Resp. Br. 39. Consistent with what the court of appeals did decide, this

[1] Respondent's amicus asserts that the government's brief on the merits raises issues that go beyond the questions presented in its petition for a writ of certiorari. Amicus Br. 2-4, 6-10. That suggestion is unfounded. In the section of its opening brief that discusses the standard for determining whether a plain Rule 11 error affects substantial rights, the government urged the Court to adopt the approach followed by nine courts of appeals and to reject both the Ninth Circuit's approach and the "core concerns" approach of the Eleventh Circuit. Br. 20-31. The position set forth in the certiorari petition, which asked the Court to resolve this three-way circuit split, is the same as that in the government's opening brief. See Pet. 15-20.

Court granted certiorari to resolve a conflict over the standard for determining when a violation of Rule 11 constitutes reversible plain error. See Pet. i, 15-23.

Respondent's constitutional claim also fails on the merits. While this Court has made clear that a guilty plea may be constitutionally invalid if the defendant does not understand the nature of the charge to which he is pleading or certain constitutional rights that he is waiving, see *Henderson* v. *Morgan*, 426 U.S. 637, 645 n.13 (1976); *Boykin* v. *Alabama*, 395 U.S. 238, 243 n.5 (1969), the record in this case leaves no doubt that respondent understood both the nature of the charge and all of his constitutional rights.[2] Respondent does not contend otherwise. His claim is that his guilty plea was constitutionally invalid because the district court failed to advise him that he could not withdraw the plea if the court did not accept the parties' sentencing recommendations. See Resp. Br. 32-33. The premise of that claim seems to be that any violation of Rule 11 prevents a plea from being knowing and voluntary. See, *e.g.*, *id.* at 17 (referring to "the constitutional principles imbedded in Rule 11"). But this Court has

[2] Both the plea agreement and the district court advised respondent of the nature of the conspiracy charge to which he was pleading and of the various constitutional rights he was waiving. Pet. App. 26a-27a, 28a-29a; J.A. 62, 63, 67-68. Respondent acknowledged, both when he signed the agreement and at the time of his plea, that he understood the agreement, Pet. App. 35a; J.A. 62-63, and he specifically acknowledged during the plea colloquy that he understood the nature of the charges and his constitutional rights, J.A. 62-63, 67-68. At the conclusion of the change-of-plea hearing, the district court found, as a fact, that respondent understood both his plea agreement and the plea proceeding; that he understood "all of his constitutional rights" and "knowingly, intelligently, and voluntarily waived those rights"; and that he was pleading guilty "freely and voluntarily." J.A. 77, 79.

repeatedly rejected that view, see *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979); *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam); *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969), as respondent himself acknowledges elsewhere in his brief, see Br. 19 (quoting *McCarthy*); Br. 28 (citing *Timmreck*).

II. THE NINTH CIRCUIT'S STANDARD IS ERRONEOUS

Respondent also contends that the Ninth Circuit's standard for finding reversible Rule 11 error is correct, and that the standard applied by the majority of circuits is wrong, because, he says, the majority standard is inconsistent with this Court's decisions and would have undesirable practical consequences. Respondent is wrong on both counts.

A. The Ninth Circuit's Standard Is Inconsistent With This Court's Decisions

1. As the government pointed out in its opening brief (at 20), this Court held in *United States* v. *Olano*, 507 U.S. 725 (1993), that an effect on substantial rights under the plain-error rule has the same meaning that it has under the harmless-error rule: it ordinarily means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Id.* at 734. Despite that unambiguous holding, respondent contends that the Ninth Circuit's standard—which does not require a showing that a Rule 11 error affected a defendant's decision to plead guilty—is consistent with *Olano*. Br. 9-11, 14-15, 29. Accord Amicus Br. 4- 5, 15-18. Respondent is mistaken.

As an initial matter, the language quoted above refutes respondent's contentions that *Olano* "never required or endorsed any particular test for establishing

prejudice" and "implicit[ly] recogni[zed] that courts have the flexibility to determine what degree of prejudice, if any, will be required in a given case." Br. 10-11. *Olano* adopted a general rule requiring an effect on the outcome in order to establish prejudice. Nor can respondent square *Olano* with the Ninth Circuit's test for determining whether a Rule 11 error affected substantial rights by noting that *Olano* allowed that "a showing of prejudice may not be required at all under some circumstances." Br. 10. While *Olano* did refer to the "special category of forfeited errors that can be corrected regardless of their effect on the outcome," 507 U.S. at 735, that category consists of "structural" errors—those "fundamental constitutional errors" that "defy harmless-error review" because, instead of being simply "error[s] in the trial process itself," they "affect[] the framework within which the trial proceeds" and thus "infect the entire * * * process." *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991), and *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993)). As the government explained in its opening brief (at 30-31), a district court's failure to provide a particular piece of advice required by Rule 11, whose procedures are not even of constitutional magnitude, is far removed from the small category of errors that have been held to be "structural." And even if a Rule 11 error were somehow thought to be "structural," such that it necessarily satisfied the third requirement of the plain-error rule, this Court's decisions in *Johnson* v. *United States*, 520 U.S. 461 (1997), and *United States* v. *Cotton*, 535 U.S. 625 (2002), make clear that a defendant claiming a Rule 11 violation cannot satisfy the *fourth* requirement of the rule—a serious effect on the fairness, integrity, or public reputation of a judicial proceeding—unless he

demonstrates that the error affected the proceeding's outcome. See U.S. Br. 31-34.

Respondent contends that the Rule 11 error in this case "did affect the outcome" of the district court proceedings, because "he was sentenced to 12-33 more months than he bargained for." Br. 10. Accord *ibid.* ("he was prejudiced by receiving a significantly harsher sentence"); Amicus Br. 17. Under these circumstances, respondent says, "the prejudice is * * * abundantly obvious." Br. 11. But unless respondent would have declined to plead guilty if he had been advised that he could not withdraw his plea in the event that the judge imposed a longer sentence than the one set forth in the plea agreement, the failure to provide that Rule 11 advice had no effect at all on his sentence. That is why the relevant inquiry is whether the Rule 11 error affected the defendant's decision to plead guilty.

2. While this Court has not previously had the opportunity to apply *Olano*'s standard to guilty pleas, the government pointed out in its opening brief (at 21-22) that the Court has held, in a different context, that a violation of a defendant's rights in connection with a guilty plea does not result in "prejudice" unless it affected his decision to plead guilty. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), a case involving the question whether counsel's deficient performance in advising the defendant to enter a guilty plea was sufficiently prejudicial to qualify as ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court concluded that the relevant inquiry is whether, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. Respondent contends (Br. 29-30) that *Hill* provides no support for the government's position, because a violation of Rule 11 by a

district judge is different from a defense attorney's erroneous advice concerning a guilty plea.

Respondent is again mistaken. While the two situations are obviously different in some respects, they are similar in the respect that is relevant here. When a defense lawyer has given deficient professional advice in connection with a guilty plea, and the defendant seeks to have his plea vacated on the basis of the deficiency, the question, under the Sixth Amendment, is whether the defendant was prejudiced by the advice. Likewise, when a district judge has given erroneous Rule 11 advice in connection with a guilty plea, and the defendant seeks to have his plea vacated on the basis of the error, the question, under Rule 52(b), is whether the defendant was prejudiced by the advice. The principle established in *Hill*—that the relevant inquiry is whether the defendant would have persisted in his plea of not guilty if the advice had not been deficient—is thus applicable here as well.

3. Respondent also contends that the Ninth Circuit's standard is consistent with this Court's decision in *United States* v. *Vonn*, 535 U.S. 55 (2002), which, he says, "pursued an awareness analysis." Br. 14-15. By that, respondent seems to mean that the effect–on-substantial-rights standard applied in *Vonn* was whether the defendant was aware of the omitted Rule 11 information, not whether he would have persisted in a plea of not guilty if the information had been provided. That is also incorrect.

The Court did not address in *Vonn* the appropriate standard for deciding whether a plain Rule 11 error affects substantial rights. It held that a forfeited claim of Rule 11 error is reviewed under a plain-error rather than a harmless-error standard, 535 U.S. at 62-74, and that a court of appeals may consider the entire record in

conducting either plain-error or harmless-error review, *id.* at 74-76. It then remanded the case for proceedings consistent with its opinion. *Id.* at 76. While the Court did note that the standard applied by the court of appeals (in that case, too, the Ninth Circuit) was whether the defendant was aware of the omitted information, see *id.* at 61, the Court itself did not apply that (or any other) standard. And even if respondent were correct in his suggestion (Br. 15) that *Vonn* stands for the proposition that a defendant who was otherwise aware of the omitted Rule 11 information cannot establish an effect on substantial rights, that proposition would be consistent with the government's position. While an awareness of the omitted information is not a necessary basis for a finding that a defendant would have persisted in his plea of not guilty if the Rule 11 error had not occurred, it is ordinarily a sufficient one. See U.S. Br. 25-27.

B. There Is No Meritorious Practical Objection To The Standard Applied By The Majority Of Circuits

1. Respondent contends that the standard advocated by the government should be rejected because there is an inadequate record on direct appeal for a court to determine whether a defendant would have persisted in a plea of not guilty if a Rule 11 error had not occurred. Br. 35-37. A guilty plea colloquy, respondent says, "does nothing to show" whether a defendant would have gone to trial if the district court had fully complied with Rule 11. Br. 35. Respondent's argument is misguided, because its premise was explicitly rejected in *Vonn*. That case holds that a court reviewing a claim of Rule 11 error is not "limited to examining the record of the colloquy" but "may look to the entire record begun at the defendant's first appearance" in the criminal

case. 535 U.S. at 59. The record on appeal will therefore include, at the very least, the indictment or information; transcripts of the initial appearance, arraignment, change-of-plea hearing, and sentencing; the Presentence Report; the parties' sentencing submissions; the judgment of conviction; and, except in the Ninth Circuit (see Pet. 23-27), a plea agreement, if there is one. Depending on the stage of the case at which the defendant decided to plead guilty, the record may also include a complaint, search-warrant application, or wiretap application; other discovery materials; a transcript of a pre-trial detention hearing, status conference, or pre-trial motion hearing; briefing on the government's request for pre-trial detention or on a defendant's pre-trial motions; and, as was the case here, a written or oral request for substitution of counsel.

A record of this type is sufficient for a court of appeals to determine whether a Rule 11 error affected a defendant's decision to plead guilty. For example, the record will almost always enable the court to determine whether the guilty plea resulted in a significantly reduced sentence or one that was not appreciably shorter than it would otherwise have been. See U.S. Br. 26-27 & n.16. The record will also ordinarily enable the court to determine whether the evidence against the defendant was so strong that he was not likely to have risked a guilty verdict or weak enough that he may have. See *id.* at 27 & n.17. And, as in this case, the record may include statements by the defendant or his lawyer that are direct evidence either that the defendant was intent on pleading guilty or that he was reluctant to do so. See *id.* at 26 & n.15.

2. Respondent also contends that the government's proposed standard should be rejected because it is "almost impossible to meet." Br. 11. Accord *id.* at 35-

36; Amicus Br. 5, 18-19. This contention should likewise be rejected.

As an initial matter, because the plain-error rule requires a defendant to show (absent "structural" error) both that the error affected the outcome of the proceeding and that it seriously affected the fairness, integrity, or public reputation of the proceeding, *Olano*, 507 U.S. at 734-737, a court's authority to reverse on the basis of a forfeited claim of error is necessarily "limited" and "circumscribed," *id.* at 731, 732. As Judge Boudin has observed, it is always "extremely hard to establish" reversible plain error. *United States* v. *Vigneau*, 187 F.3d 70, 82 (1st Cir. 1999), cert. denied, 528 U.S. 1172 (2000). See also *Olano*, 507 U.S. at 742 (Kennedy, J., concurring). At the same time, it is not impossible to do so, and it would not be impossible in a case involving a Rule 11 error if the Court adopted the standard advocated by the government. In a case where the defendant obtained little sentencing benefit from a guilty plea, where there was a substantial chance of acquittal if the defendant had gone to trial, where the defendant made statements indicating that he was reluctant to plead guilty, or where there was a combination of factors of this kind, a court of appeals might be able to conclude that the defendant had established that the Rule 11 error affected his decision to plead guilty.

But it is not necessary to speculate about whether courts would be able to do so. The government's proposed standard is already applied by a majority of the circuits, see U.S. Br. 22 n.11, and courts in these circuits have reversed convictions on the basis of a Rule 11 violation to which there was no objection in the district court. See *United States* v. *Reyes*, 300 F.3d 555, 561 (5th Cir. 2002) (defendant's "willingness to plead guilty would likely have been affected" by knowledge of omitted Rule 11 advice); *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 4 (1st Cir. 2000) (misstated Rule 11 advice "was likely enough to have influenced the plea so that the plea should now be set aside").

3. While exaggerating the consequences of adopting the standard applied by the majority of circuits, respondent ignores the consequences of rejecting it. The latter are starkly illustrated by a Sixth Circuit decision that was filed soon after the government filed its opening brief in this case, a decision that respondent's amicus holds out as an example of a case that correctly applies the plain-error rule (Br. 14-15). In *United States* v. *Rose*, 357 F.3d 615 (6th Cir. 2004), a defendant who delivered a pound of methamphetamine with a co-defendant entered into a plea agreement in which he agreed to plead guilty to the offense of *attempting* to distribute at least 50 grams of the drug, but he instead pleaded guilty, without objecting, to *conspiring* to distribute that amount. *Id.* at 619-622. The court of appeals held that the district court committed reversible plain Rule 11 error by failing to ensure that the defendant understood the nature of the charge to which he was pleading guilty and by accepting the plea without an adequate factual basis. *Id.* at 622-626. The holding was based solely on the discrepancy between the crime to which the defendant agreed to plead guilty (attempt) and the crime to which he did plead guilty (conspiracy). *Id.* at 623-626. The court of appeals explicitly rejected the view that the defendant was required to "prove that he would not have pleaded guilty absent the deficiency in order to obtain reversal." *Id.* at 622 n.4.

Since the criminal conduct in *Rose* (delivering drugs with another person) constituted both attempt and

conspiracy, since the two offenses are violations of the same statute (21 U.S.C. 846), and since they carry the same statutory and Guidelines penalties (see 21 U.S.C. 841(b)(1)(B); Sentencing Guidelines § 2D1.1), there can be little doubt that the defendant in the case was indifferent as to whether the crime to which he pleaded guilty was attempt or conspiracy. Under these circumstances, it is not merely likely but virtually certain that any Rule 11 error did not affect the outcome of the case. The Sixth Circuit nevertheless held that the error both affected the defendant's substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. 357 F.3d at 622-623 n.4, 626. Whatever room there is for disagreement about the scope of the plain-error rule, it cannot be the case that its requirements are satisfied when the crime to which a defendant agrees to plead guilty is identical in every relevant respect to the crime to which he does plead guilty. This Court should not endorse an interpretation of the rule that would lead to such a result.

III. RESPONDENT CANNOT ESTABLISH THAT HE WOULD HAVE PERSISTED IN HIS PLEA OF NOT GUILTY IF HE HAD BEEN GIVEN THE OMITTED RULE 11 ADVICE

In addition to arguing that his guilty plea was unconstitutional, and that the government's proposed standard is incorrect, respondent argues that he can satisfy that standard. Br. 37-39. He contends that he is able to show that he would have persisted in his plea of not guilty if he had been given the Rule 11 advice omitted by the district court: that he could not withdraw his plea if the court rejected the parties' sentencing recommendations. *Ibid.* But respondent does not deny that he made no attempt to withdraw his guilty plea in the

district court; he does not deny that statements he made to the district court show that he did not wish to go to trial; he does not deny that a guilty plea enabled him to avoid a significantly longer prison term; he does not deny that the evidence of his guilt was overwhelming, and thus made the chances of acquittal low; and he does not deny that the district court repeatedly advised him that it was not bound by the plea agreement. See U.S. Br. 35-38. Nor does respondent claim to have been under the impression that he *would* be able to withdraw his plea if the district court did not follow the parties' sentencing recommendations. See *id.* at 38. Finally, and perhaps most importantly, respondent has still never stated, in clear and unequivocal terms, that he would have elected to go to trial if he had been given the omitted Rule 11 advice. See *id.* at 35-36. Cf. *Hill* v. *Lockhart*, 474 U.S. at 60 (no prejudice where defendant "did not allege" that, had counsel not given erroneous advice, "he would have pleaded not guilty and insisted on going to trial").

Instead, respondent claims to be able to demonstrate that the Rule 11 error affected his decision to plead guilty because he was "ready to go to trial"; because he was provided with inadequate information by his lawyer and felt "railroaded" into signing his plea agreement; because he "moved to withdraw his plea through the direct appeal process"; and because he "might have had" an entrapment defense. Br. 37-38. These assertions do not enable respondent to discharge his burden of establishing reversible plain error.

First, the status conference at which respondent's counsel informed the district court that he was "ready to go to trial" (Resp. Br. 37) was the very conference at which respondent himself stated that "[t]he only thing I'm looking for is * * * a better deal" and that "[a]t no

time have I decided to go to any trial." J.A. 46-47. (Contrary to respondent's contention that he made these statements "more than one month" before he pleaded guilty, Br. 33, the status conference was held less than a week before his plea.) And while respondent's lawyer did inform the court that respondent was *ready* for trial, he did so in a way that made it clear that respondent did not wish to have one. Thus, when the court asked whether he was prepared to go to trial on October 19, 1999, respondent's counsel said the following:

> [Respondent,] as he has indicated here in court, doesn't want a trial. And I have represented that to [the Assistant United States Attorney] on several occasions.
>
> So to the extent that the government somehow wouldn't be ready on the 19th, it would be largely based on representations by me to [the Assistant United States Attorney]. I've told her all along there won't be a trial on the 19th based on my client's representations that he doesn't want a trial.
>
> And I do not have another trial set for that date, however, and I suppose if there would be a trial on that date, I would be here and be ready to try it. Nobody seems to be asking for one, though.

J.A. 51-52.

Second, while it is true that, after pleading guilty (and before he was sentenced), respondent expressed the view in a letter to the district court that he felt he had been "railroaded into signing the deal that I signed" (J.A. 98), that statement, particularly when viewed in the context of the entire record, is not evidence of a desire to go to trial. It is, instead, evi-

dence that respondent was unhappy with the sentence recommended in the Presentence Report, and it is entirely consistent with his earlier statement to the court that he never wanted to go to trial and was only looking for a more favorable plea agreement. The same is true of respondent's complaints about his attorney at the sentencing hearing, where he explicitly acknowledged that he had "always accepted responsibility" for his crime. J.A. 112. Respondent complained because he wanted a better plea bargain, not because he wanted a trial instead of a plea.

Third, because a defendant can move to withdraw a guilty plea only before sentencing, see Fed. R. Crim. P. 32(d) and (e), respondent's contention that he "moved to withdraw his plea through the direct appeal process" (Br. 37) is an oxymoron. Respondent makes no attempt to explain why, if he had truly been misled into pleading guilty by the omission of the Rule 11 advice, he did not move to withdraw his plea at the earliest possible opportunity, which in this case was no later than when he learned of the sentence recommended in the Presentence Report. See *United States* v. *Westcott*, 159 F.3d 107, 112 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999); *United States* v. *Vaughn*, 7 F.3d 1533, 1536 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994).

Fourth, if it were true that respondent "might have had" a viable entrapment defense (Resp. Br. 38), one would think that his attorney's failure to pursue that strategy would have been one of respondent's complaints about his lawyer in the district court. But as the court of appeals observed in rejecting respondent's claim that the district court should have granted his motion for substitution of counsel, "[i]n his letters and statements to the [district] court, [respondent] never alleged [that his attorney] was failing to investigate an

entrapment defense." Pet. App. 23a. If respondent did have a colorable entrapment defense, one would also think that he would at least describe its factual basis, particularly since it is respondent's burden to establish that the Rule 11 error affected his decision to plead guilty. But his brief is silent on that issue. There is thus no reason to believe that respondent would have gone to trial, admitted his crime, and argued entrapment to the jury if he had known that a sentence higher than the stipulated one would not entitle him to withdraw his plea.

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
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APRIL 2004

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

(5)

No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR ARNALDO RAFAEL VICENTE INFANTE-CABRERA IN SUPPORT OF RESPONDENT

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March 11, 2004

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QUESTION PRESENTED

Whether the only means of demonstrating that a forfeited Rule 11 error satisfies the "affects substantial rights" prong of the plain error standard is to establish that but for the Rule 11 error the defendant would not have pled guilty.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS II

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

A. The Government Improperly Seeks To Use This Case To Decide Issues Not Raised By Its Petition That Are Presented In *Infante* 6

1. The Narrow Question Before The Court Relates To The Definition Of "Affects Substantial Rights" Under The Plain Error Standard In Rule 11 Cases 6

2. The Government's Brief Improperly Raises Several Issues From The *Infante* Petition That Are Not Fairly Presented By This Case, Contrary To Its Opposition To The *Infante* Petition 7

B. The Government's Proffered Reason for Granting Certiorari In *Benitez* Mischaracterizes The Existing Plain Error Jurisprudence 10

1. The Ninth Circuit Already Applies the Government's Proposed Standard 10

2. The Alleged Circuit Split Is Illusory 11

3. The Plain Error Analysis Employed By The Ninth Circuit Is Consistent With This Court's *Olano* Decision, And With Constitutional Safeguards and the Mandate of Rule 11 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Brady v. United States,
397 U.S. 742 (1970) 19

Chapman v. California, 386 U.S. 18 (1967) 9

Hill v. Lockhart,
474 U.S. 52 (1985) 20

Long v. United States,
883 F.2d 966 (11th Cir.1989) 14

United States v. *Dixon*,
308 F.3d 229 (3d Cir. 2002) 12

United States v. Fuentes-Mendoza,
56 F.3d 1113 (9th Cir. 1995) 11

United States v. Harrington,
354 F.3d 178 (2nd Cir. 2003) 19

United States v. *Johnson*,
1 F.3d 296 (5th Cir. 1993) 12

United States v. Johnson,
520 U.S. 461 (1997) 16

United States v. Luna-Orozco,
321 F.3d 857 (9th Cir. 2003) 10, 14

United States v. *Lyons*,
53 F.3d 1321 (D.C. Cir. 1995) 11

United States v. *Martinez*,
277 F.3d 517 (4th Cir. 2002) 12

United States v. *Martinez*,
289 F.3d 1023 (7th Cir. 2002) 12

United States v. McCarthy,
97 F.3d 1562 (8th Cir. 1996) 13, 20

United States v. Monroe,
353 F.3d 1346 (11th Cir. 2003) 14

United States v. *Noriega-Millán*,
110 F.3d 162 (1st Cir. 1997) 11, 12

United States v. Olano,
507 U.S. 725 (1993) ..... passim

United States v. Rose,
357 F.3d 615 (6th Cir. 2004) 14

United States v. Sanclemente-Bejarano,
861 F.2d 206 (9th Cir.1988) 10, 14

United States v. *Vaughn*,
7 F.3d 1533 (10th Cir. 1993) 13

United States v. Vonn,
535 U.S. 55 (2002) 16

United States v. *Westcott*,
159 F.3d 107 (2d Cir. 1998) 11

STATUTES

21 U.S.C. § 963 1

RULES

Federal Rule of Criminal Procedure 11 ..... 2, 6

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BRIEF *AMICUS CURIAE* FOR ARNALDO RAFAEL VICENTE INFANTE-CABRERA IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

Arnaldo Rafael Vicente Infante-Cabrera is a federal inmate who presently stands convicted of violating 21 U.S.C. § 963. At the trial where this conviction occurred, Mr. Infante was permitted to enter an unknowing and involuntary

[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no party other than counsel for amicus authored this brief in whole or in part, and no person or entity, other than amicus, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), Petitioner and Respondent have consented to the filing of this brief and appropriate letters of consent will be filed with the Clerk of the Court.

guilty plea during a confusing multi-defendant plea hearing that was tainted by numerous violations of Federal Rule of Criminal Procedure 11. After Mr. Infante's conviction was affirmed on appeal, he filed a petition for writ of certiorari with this Court raising several issues regarding the adequacy of his plea hearing and the constitutionality of his guilty plea. That petition remains pending. *See Arnaldo Rafael Vicente Infante-Cabrera a/k/a Juan Santos v. United States*, No. 03-6234 (filed Sept. 8, 2003) ("*Infante* Petition"). The *Infante* Petition was filed approximately one month after the government filed its petition in the present case. *United States v. Carlos Dominguez Benitez*, No. 03-167 (filed Aug. 4, 2003).

The *Infante* Petition raises multiple related, but much broader, plain error issues than the narrow plain error question presented by the *Benitez* case. The potential impact of the instant case on Mr. Infante's case increased significantly when the government's opening brief on the merits in this case included several issues that are not raised by the facts of the *Benitez* case (or fairly encompassed within the question accepted for review by this Court) but which are squarely presented by the *Infante* Petition. It is believed that the present amicus brief will assist the Court in better understanding those issues, as well as ensuring that the interests of similarly situated indigent defendants in the criminal justice system are adequately represented.

SUMMARY OF THE ARGUMENT

Amicus curiae files this brief for two principal reasons. First, Mr. Infante desires to inform the Court that the government's merits brief in this case seeks to broaden the scope of this Court's review far beyond the limited plain error issue raised in the government's petition, and does so in an apparent attempt to have this Court reach and resolve

important issues not presented by the instant case but clearly raised by the *Infante* Petition. Second, Mr. Infante will demonstrate that the narrow issue raised by the government's petition in this case upon which review was accepted is based on an illusory circuit split and a mischaracterization of the Ninth Circuit's holding in *Benitez*.

The only plain error issue raised or argued in the government's petition in this case concerned the application of the "affects substantial rights" prong of the plain error standard. Specifically, the government argued that the only way to satisfy that prong in Rule 11 cases is for a defendant to show prejudice by demonstrating that "but for" the alleged Rule 11 error he would not have pled guilty. The Court granted certiorari on that limited question presumably based on the government's representation that the plain error standard adopted by the Ninth Circuit and applied in *Benitez* conflicts with the overwhelming majority of other circuits, which purportedly have adopted the above "prejudice" test as the exclusive method of establishing that a Rule 11 error "affects substantial rights."

In its merits brief, however, the government either explicitly or implicitly raises at least the following additional issues that are not fairly included within the limited question accepted for review: (1) whether plea colloquy errors that transgress the "core concerns" of Rule 11 violate the Constitution and render a guilty plea unknowing and involuntary; (2) whether such errors require no showing of prejudice under the plain error standard or will be deemed presumptively prejudicial; (3) whether such errors are structural in nature and thus not subject to the plain error standard; and (4) whether the cumulative effect of multiple plea colloquy errors warrants a different standard of plain error review. None of these issues are presented in *Benitez*, none of these issues were properly raised in the government's

certiorari petition, and none of these issues are germane to the merits of *Benitez*. On the other hand, each of those issues is directly raised by the *Infante* Petition.

In opposing the *Infante* Petition, the government argued that, while that case raises the same narrow plain error question presented by *Benitez*, the *Infante* Petition presented no other issues warranting the Court's consideration. The government argued that *Benitez* was clearly a "better vehicle" for addressing the plain error question common to both cases and urged the Court to hold the *Infante* Petition pending the disposition of *Benitez*. The Court has apparently honored that request. Yet now, the government is seeking to have the Court resolve or effectively foreclose issues raised in the *Infante* Petition that the government had previously characterized as unimportant, without even informing the Court of the *Infante* Petition or its relevance. It is unfair and improper for the government to argue the merits of the *Infante* Petition in an unrelated case without giving Mr. Infante an opportunity to join the issues. It is likewise unfair to expect the respondent in *Benitez* to address new issues not previously raised in this case and not relevant to resolution of the narrow question presented by this case.

The premise of the government's position in *Benitez* is that the Ninth Circuit applied a plain error analysis that used the wrong definition of "affects substantial rights" and thereby deviated from the prejudice test allegedly required by nearly every other federal appeals court. The government is wrong on both points. To begin with, the Ninth Circuit, like other circuits, has articulated a variety of formulations when determining whether plain error affects substantial rights under the particular facts of a given case, including the very prejudice test that the government urges the Court to adopt here. The Ninth Circuit's application of the plain error

standard generally, as well as the *Benitez* panel's analysis specifically, are entirely consistent with the flexible standard contemplated in *United States v. Olano*, 507 U.S. 725 (1993), this Court's seminal plain error case.

The government's brief thus mischaracterizes the *Benitez* holding and the Ninth Circuit's plain error jurisprudence. It also wrongly asserts that the majority of circuits hold that a Rule 11 error affects substantial rights *only* if the error affected the defendant's decision to plead guilty. None of the cases cited by the government support the rigid test that it endorses. In fact, several of the cases it cites actually demonstrate that federal appellate courts employ a variety of case-specific approaches to determining whether a given Rule 11 error affected a defendant's substantial rights. Hence, the circuit split allegedly perpetuated by the *Benitez* holding is illusory.

The government's call for this Court to use the *Benitez* case to announce a bright line, overly-strict prejudice test that relies exclusively on deciding whether a defendant would not have pled guilty but for a Rule 11 error not only is not required by the case law, it is antithetical to time-honored Constitutional safeguards. Rather than furthering the core purpose of Rule 11 of ensuring knowing and voluntary guilty pleas, the prejudice test urged by the government disregards a defendant's actual awareness of the consequences of his plea in favor of an inquiry that would be mired in speculation and virtually impossible for any defendant to meet. Contrary to the express language and history of Rule 11, the government's test would permit "harmless error" findings to become the exception that swallows the rule, thereby nullifying the Rule 11 safeguards. Because the plain error standard used by the court of appeals in *Benitez* suffers from no such infirmities, the decision in *Benitez* should be affirmed and the *Infante* Petition granted.

ARGUMENT

A. The Government Improperly Seeks To Use This Case To Decide Issues Not Raised By Its Petition That Are Presented In *Infante*

1. The Narrow Question Before The Court Relates To The Definition Of "Affects Substantial Rights" Under The Plain Error Standard In Rule 11 Cases

In its petition for writ of certiorari, the government framed its first question presented in these terms: "Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred." Pet. 03-167 at (I). Consistent with that formulation, the focus of the government's petition was on demonstrating that "a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, only if it affected the defendant's decision to plead guilty." *Id.* at 19. The government specifically argued that *Benitez* was worthy of the Court's review precisely because the Ninth Circuit had not used the above prejudice test and its holding was thus "inconsistent with the position of every other court of appeals to consider the question." *Id.* at 15.

Consistent with the government's representations and argument, the Court entered an order on December 8, 2003, stating: "The petition for a writ of certiorari is granted limited to Question 1 presented by the petition." The question accepted for review was thus limited to the narrow issue presented and argued by the government's petition—*i.e.*, the formulation of the "affects substantial rights" prong. By the time the government filed its merits brief, however, it had considerably broadened its focus to address a variety of other plain error issues. As noted below, that expanded focus

seems to have come in direct response to the issues raised by the *Infante* Petition.

2. The Government's Brief Improperly Raises Several Issues From The *Infante* Petition That Are Not Fairly Presented By This Case, Contrary To Its Opposition To The *Infante* Petition

The *Infante* Petition raises several important plain error questions not raised by *Benitez*. For example, rather than raising a narrow issue concerning a particular formulation of the "affects substantial rights" prong recited in a given case, the *Infante* Petition presents the broader issue of whether there are categories of Rule 11 error for which no showing of prejudice is required or for which prejudice should be presumed. *See* Pet. 03-6324, at 18-25.

The *Infante* Petition argues that "core concern" error constitutes such a category because such error "strikes at the heart of what Rule 11 was designed to prevent—the unknowing and unintelligent waiver of constitutional rights." *See, e.g., United States v. Hernandez-Fraire*, 208 F.3d 945, 951 (11th Cir. 2000). It further argues that Rule 11 error that renders a plea unknowing or involuntary requires correction irrespective of the application of any prejudice standard. The *Infante* Petition devotes substantial attention to and argues that such error should be treated as structural in nature. Finally, the *Infante* Petition argues that a combination of plea colloquy errors can rise to the level of reversible plain error even if each error standing alone would be deemed harmless.

The government's petition in *Benitez* discussed none of these issues, whereas its merits brief now attempts to raise them all. Moreover, in its opposition to the *Infante* Petition, the government argued that, while *Infante* raises the same narrow plain error question presented by *Benitez*, the *Infante*

Petition presented no other issues warranting the Court's consideration. *See* Pet. 03-6234, U.S. Br. in Opp., at 6-12. The government argued that *Benitez* was clearly a "better vehicle" for addressing the plain error question common to both cases and urged the Court to hold the *Infante* Petition pending the disposition of *Benitez*. *See id* at 9. The Court has apparently honored that request.

From a review of the government's merits brief in this case, the government apparently has had a change of heart. For example, whereas its petition in *Benitez* merely alluded to the concepts of structural error or special categories of error requiring little or no showing of prejudice in a single footnote on page 19, *see* Pet. 03-167 at 19 n.10, the government's merits brief devotes multiple pages to refuting the argument (not made in *Benitez*) that no category of Rule 11 error can be deemed structural error or otherwise qualify for a lesser showing of prejudice under the plain error standard, *see* U.S. Br. (03-167), at 17, 22-23, 28-31.

The same is true of the case law analyzing "core concern" error under Rule 11. Where the *Infante* Petition discusses core concern cases at length, the government's *Benitez* petition made only a passing reference to that case law. Pet. 03-167 at 15-16. The same cannot be said of the government's merits brief. As with its newly addressed topic of structural error, the government now spends several pages challenging core concern arguments nowhere raised or asserted in *Benitez*. *See* U.S. Br. (03-167), at 17, 22-23, 28-31.

Although S. Ct. Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein," no reasonable argument can be made that the new plain error issues being asserted by the government are "fairly included"

in the narrow question taken by this Court for review. Rather, it is evident that the government is attempting to raise the merits of the *Infante* Petition in this case, only without bothering to tell the Court that it is doing so and without giving the Court the benefit of hearing from the petitioner in that case.

Amicus curiae urges the Court to either refuse to consider the improperly added issues in the government's merits brief and limit its decision in this case to the narrow question for which review was actually granted, or in the alternative, to join the *Infante* case with *Benitez* and consider them together while permitting petitioner in that case the equal opportunity to brief the merits. Amicus will not use the instant brief to reassert all of the pertinent plain error issues and arguments advanced in the *Infante* Petition, but instead respectfully requests the Court to review that petition and the petitioner's reply brief in the context of deciding the proper scope of the issue presented in this case. Suffice it to say that the government's arguments regarding structural error and the standards applicable to "core concern" errors lack merit and should be rejected.

Rule 11 is of such vital importance in safeguarding constitutional rights and preserving the integrity of the guilty plea process that this Court should recognize core concern errors as a special category of Rule 11 error that requires no showing of actual prejudice. Such errors should be held to be analogous to "structural error" for which reversal is automatically required. Alternatively, the seriousness of core concern violations of Rule 11 warrants that they be analyzed either under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), which requires that the government prove the error harmless beyond a reasonable doubt, or at least that they be viewed as a special category of "presumptively prejudicial" error for which the burden

should shift to the government to prove that the error did not affect a defendant's substantial rights.

B. The Government's Proffered Reason for Granting Certiorari In *Benitez* Mischaracterizes The Existing Plain Error Jurisprudence

The government's position is founded on the premise that "a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, ***only*** if it affected the defendant's decision to plead guilty." Pet. 03-167, at 19 (emphasis added). According to the government, the Ninth Circuit erred by not using those words to define the "affects substantial rights" prong in *Benitez* and has adopted an erroneous prejudice standard that is "inconsistent with the position of every other court of appeals to consider the question." *Id* at 15. However, that position mischaracterizes the Ninth Circuit's plain error jurisprudence and alleges a circuit split that is illusory.

1. The Ninth Circuit Already Applies the Government's Proposed Standard

To begin with, the Ninth Circuit, like other circuits, uses a variety of formulations to determine whether plain error affects substantial rights under the facts of a given case. Among the formulations used by the Ninth Circuit is the very prejudice test that the government urges the Court to adopt here: "To prove prejudice, Luna-Orosco must show that his plea was either unknowing or involuntary, or that he would not have pled guilty." *United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003); *see also United States v. Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir.1988) (holding Rule 11 error harmless where, because of defendant's actual knowledge, violation "could not have had any impact on the defendant's decision to plead guilty, or the fairness in holding him to that plea"), *overruled on other*

grounds, *United States v. Fuentes-Mendoza*, 56 F.3d 1113, 1114-16 (9th Cir. 1995).

The government attempts to downplay the existence of these other Ninth Circuit decisions to create the appearance, based on *Benitez*, that the Ninth Circuit is at odds with its sister circuits. Actually, however, the circuit courts have been virtually uniform in declining to invoke a "one size fits all" test based on the single prejudice criterion that the government now urges should be applicable to every type and form of Rule 11 violation.

2. The Alleged Circuit Split Is Illusory

As its premise for obtaining review, the government asserted that "the majority of circuits have held [that] a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, ***only*** if it affected the defendant's decision to plead guilty." Pet. 03-167, at 19 (emphasis added). The government contended that the D.C., First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits all endorse this prejudice test as the exclusive method of satisfying the "affects substantial rights" prong. *Id* at 15 However, the cases cited by the government do not support this view.

Rather, those cases generally show only that the circuit courts have applied that standard of prejudice in some circumstances. *See, e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995) (not describing the standard used as the "only" way to show prejudice in Rule 11 cases); *United States* v. *Noriega-Millán*, 110 F.3d 162, 167 (1st Cir. 1997) (same); *United States* v. *Westcott*, 159 F.3d 107, 112-113 (2d Cir. 1998) (same), *cert. denied*, 525 U.S. 1084 (1999); *United States* v. *Dixon*, 308 F.3d 229, 234 (3d Cir. 2002) (same); *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.) (same), *cert. denied*, 537 U.S. 899 (2002); *United*

States v. *Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (same); *United States* v. *Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002) (same).

While the cases cited above do not exclusively adopt the prejudice standard that the government now proposes, several do describe different factors or additional standards to be considered as well. For example, in *Noriega-Millan*, 110 F.3d at 166–67, the First Circuit expressly stated that a guilty plea should be set aside "for violations that implicate the 'core concerns' of Rule 11." Likewise, rather than endorsing the government's proposed test relying exclusively on actual prejudice, the Third Circuit had articulated a different test altogether: "When assessing prejudice in the context of a plea, we must 'determine if, given the entire record (including the defendant's individualized circumstances, criminal record, role in the offense, and concession for pleading guilty), it affirmatively appears [] likely that the error materially hampered his or her ability to assess the risks and benefits of pleading guilty.'" (Citation omitted; emphasis added.)

Similarly, the Fifth Circuit in *Johnson* did not mandate a test requiring strict or exclusive reliance on prejudice, but explained that appellate courts will "examine the facts and circumstances of the ... case to see if the district court's flawed compliance with ... Rule 11 ... may reasonably be viewed as having been a material factor affecting [defendant]'s decision to plead guilty." *Johnson*, 1 F.3d at 302 (citation omitted); *see also Martinez*, 277 F.3d at 527 (stating that "showing prejudice ***usually*** means demonstrating that a defendant would not have pleaded guilty absent the error") (emphasis added).

The only cases cited by the government that actually used the word "only" when describing a prejudice test are the

Eighth and Tenth Circuits, but even those cases do not fully endorse the government's overly-strict articulation of that test. In *United States v. McCarthy*, 97 F.3d 1562, 1575 (8th Cir. 1996), the Eighth Circuit stated that Rule 11 error "warrants reversal ***only*** if it had a significant influence on [the defendant's] decision to plead guilty," but the court qualified its statement (and clearly moved away from the government's proposed prejudice test) by explaining two sentences later that the error "is not harmless error if there is a realistic likelihood that the appellant pleaded guilty under the misapprehension that he could withdraw his plea if the court did not follow the government's recommendation." 97 F.3d at 1575, (emphasis added).

In *United States* v. *Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993), the Tenth Circuit decision cited by the government, the court of appeals stated that "[i]n addressing the harmless error rule of subsection 11(h), the district court's error warrants reversal only if it had a significant influence on appellant's decision to plead guilty." Thus, while the Tenth Circuit included the word "only" in its explanation, even that court did not really inquire whether "but for" the Rule 11 error the defendant would have pled guilty, as the government urges here, but rather considered whether the error had a "significant influence" on the defendant's decision to pled guilty.

It is clear from reviewing the cited authorities that the courts of appeals have not uniformly adopted or supported the extreme proposition urged by the government and do not establish the existence of a significant circuit split. Instead, the government has selectively cited isolated statements or language from those opinions as allegedly showing that a majority of courts have adopted a rigid standard that clearly does not exist.

Moreover, there are Ninth Circuit and Eleventh Circuit cases containing similar or stronger language in support of the government's proposed standard of prejudice in appropriate factual settings. *See, e.g., Luna-Orozco*, 321 F.3d at 860 (*supra*); *see also United States v. Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir.1988) (holding Rule 11 error harmless where, because of defendant's actual knowledge, violation "could not have had any impact on the defendant's decision to plead guilty, or the fairness in holding him to that plea"); *United States v. Monroe*, 353 F.3d 1346, 1356 (11th Cir. 2003) ("Monroe has not shown, or even argued, that he would not have pled guilty had he been more fully apprised of his listed right against compelled self-incrimination."); *Long v. United States*, 883 F.2d 966, 968-69 (11th Cir.1989) (where defendant pled guilty having been advised of twenty year maximum penalty if probation were revoked, but actual maximum was ten years, mistaken advice could not have induced guilty plea). Hence, the circuit split allegedly perpetuated by the *Benitez* holding is illusory.

One circuit not mentioned by the government is the Sixth Circuit, which very recently considered and expressly rejected the government's proposed prejudice test being urged in this case. *See United States v. Rose*, 357 F.3d 615 (6th Cir. 2004). *Rose* involved a challenge to a district court's failure to adequately inform the defendant of the charges against him and to ensure there was a sufficient factual basis for the charges. After acknowledging that this Court had granted review of *Benitez* specifically to address whether a defendant must prove that he would not have pleaded guilty absent a Rule 11 error, the Sixth Circuit concluded:

> This circuit has not yet imposed on defendants, who seek to obtain reversal of their convictions pursuant to guilty pleas based upon deficiencies at their Rule 11 proceedings, a requirement that they prove that they would not have pleaded guilty absent the deficiencies, and we decline to do so in this case. Instead, we conclude that the error that occurred during Rose's Rule 11 proceeding was so egregious that it prevented Rose from understanding what crime he was pleading guilty to, and thus constitutes plain error. We will not impose on Rose the burden of demonstrating that he would not have pleaded guilty absent the deficiency.

Id. at 622 n.14. It is noteworthy that the most recent circuit court to consider the government's proposed test rejected it, even though the present case had already been accepted for review. For the same reasons, this Court should reject that proposed test as well.

3. The Plain Error Analysis Employed By The Ninth Circuit Is Consistent With This Court's *Olano* Decision, And With Constitutional Safeguards and the Mandate of Rule 11

The government further contends that the Ninth Circuit's plain error analysis in *Benitez* deviates from the teachings of this Court's plain error precedent. However, that is not accurate. The Ninth Circuit applied the well-settled three-prong standard set out in *Olano*—whether there was (1) error, (2) that was plain, and (3) that affected the respondent's substantial rights. *See United States v. Benitez*, 310 F.3d 1221, 1224-25 (9th Cir. 2002). The record was clear, and the government conceded, that the district court had in fact committed plain error by failing to advise the respondent that he could not withdraw his plea if he did not

intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (*quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). The government's position disregards these time-honored principles of constitutional law.

The government's proposed prejudice test is thus inimical to rudimentary due process and to fair and constitutionally proper guilty plea proceedings. By eliminating any responsibility or need for a court to determine that defendants were actually aware of the consequences of their pleas, the government is essentially trying to eviscerate the "knowing" prong of a constitutionally valid plea. However, "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

The guilty plea hearing serves as the vehicle for safe delivery and preservation of constitutionally mandated safeguards for the criminal defendants that are the focus of that proceeding. An event that resolves 95% of all federal criminal cases brought in the United States should demand more respect and allow more critical examination from appellate courts than the government's perfunctory standard would afford.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed or, alternatively, the writ dismissed as improvidently granted. In any event, this Court should decline the government's invitation to use the *Benitez* case to address the important Rule 11 and plain error issues not

presented therein or necessary to its resolution and should instead grant the *Infante* Petition.

Respectfully submitted.

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MARCH 2004

ultimately receive the sentence he bargained for. *See id.* at 1225. After carefully reviewing the entire record—including the respondent's written plea agreement—as mandated by *United States v. Vonn*, 535 U.S. 55 (2002), the Ninth Circuit concluded that there was nothing in the record adequately demonstrating that the respondent understood the consequences of his plea—*i.e.*, that he understood he was waiving the right to plead not guilty if the district court did not give him his bargained-for sentence. *See Benitez*, 310 F.3d at 1226-27.

Strictly adhering to *Olano*, the Ninth Circuit then evaluated whether the seriousness of the district court's conceded plain error warranted exercise of the appellate court's remedial discretion. Concluding that "[h]olding Benitez to his guilty plea when he was not fully aware of the consequences of the plea would constitute a miscarriage of justice," *Benitez*, 310 F.3d at 1227, the court of appeals exercised its discretion to grant relief. *See Olano*, 507 U.S. at 732 (observing that plain error should be corrected to prevent a miscarriage of justice); *United States v. Johnson*, 520 U.S. 461, 470 (1997) (same).

Rather than being inconsistent with the Court's plain error jurisprudence, the Ninth Circuit in *Benitez* employed the very analysis taught by *Olano* and its progeny. At most, the government takes issue with certain language the *Benitez* court used to describe the "affected substantial rights" prong of *Olano*. The Ninth Circuit held that the respondent could show his substantial rights were affected by showing "that the [district] court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." *Benitez*, 310 F.3d at 1225. According to the government, the Ninth Circuit was required under *Olano* to determine if respondent's substantial rights were affected

only by asking whether the respondent would have pled not guilty but for the district court's Rule 11 error.

Olano does not mandate the prejudice test advocated by the government. In fact, *Olano* properly does not mandate any prejudice test at all. Instead, this Court recognizes that there may be certain categories of error for which no showing of prejudice will be required. *See* 507 U.S. at 734-35. The Court in *Olano* concluded by observing that it "need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'" *Id.* at 735. *Olano* did explain that "in most cases [affect substantial rights] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.* But this Court never imposed any unique or solitary standard for making such a determination, and nothing in the text of the opinion supports the government's argument that *Olano* mandates its proposed version of the prejudice test.

Consequently, to the extent that *Olano* establishes a prejudice test for those cases where a showing of prejudice is necessary to establish Rule 11 error warranting relief, that test only requires a showing that the asserted error "affected the outcome of the district court proceedings." *Id.* One obvious way to determine if a Rule 11 error had an effect on the outcome of the plea proceeding is for the reviewing court to determine whether the defendant received harsher penalties than those to which he or she agreed to be subjected when pleading guilty. This is what occurred in *Benitez*. An even more fundamental way to show that plain Rule 11 error had an effect on the outcome of a plea proceeding is to determine whether the district court's failure to provide required Rule 11 warnings led to the entry of an unknowing and involuntary guilty plea. That too occurred in *Benitez*. The "cause" was the district court's failure to take the statutorily mandated steps of ensuring that the respondent

understood the consequences of the plea he was making. The "effect" was the entry of a plea that was not knowing and voluntary. Hence, the court of appeals simply realized that there is no reasonable basis for arguing that the district court's Rule 11 error in *Benitez* did not affect the outcome of the respondent's "proceedings."

According to the government, appellate courts should be required to turn a blind eye to such obvious effects on the outcome of a plea proceeding and focus narrowly on deciding whether the outcome of the defendant's individual plea-making decision would have been affected by the plea colloquy error. Thus, under the government's proposed test, an error will have "affected the outcome" only if the defendant would not have pled guilty absent the error. This view ignores the plain language of *Olano* that indicates that courts should look to the outcome "***of the district court proceedings***," 507 U.S. at 734, not the outcome of a particular subjective decision by the defendant that takes place during the course of those proceedings.

Moreover, the government's proposed rule would require appellate courts to ignore the existence of obvious error and prejudice in cases such as *Benitez* in favor of engaging in a highly speculative, unreliable, post hoc assessment of how Rule 11 error might have affected the subjective thought processes and motivations of a criminal defendant. Such a proposal would be entirely unworkable and of dubious merit. Just as paramedics should not base their decision on whether to render aid by guessing what the injured party might have done under different circumstances to avoid or minimize the injuries actually suffered, courts should not be limited when exercising their discretion to remedy plain Rule 11 error to deciding only whether the defendant likely still would have pled guilty. At its core, the approach urged by the government can never amount to more

than a judicial guess bordering on being mere hindsight speculation. This would do violence to the long-held notion that a guilty plea is "a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970).

The advisory committee's notes to the 1983 amendments to Rule 11 emphasized that Rule 11(h)'s harmless error provision "should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards." *See United States v. Harrington*, 354 F.3d 178, 184 (2nd Cir. 2003) ("whether an error was in fact harmless because it did not prejudice the defendant must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind") (internal citation omitted). The practical impact of adopting the government's prejudice test will be to find virtually all Rule 11 error harmless. Such a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with ... the rules of fundamental justice." *Olano*, 507 U.S. at 732 (*quoting Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

Finally, the government's proposed approach disregards the constitutional mandate of a knowing and voluntary plea. Any plea colloquy error that leads to entry of an unknowing and involuntary plea is, by definition, violative of the Constitution and thus prejudicial. Whether a defendant's ultimate decision to plead guilty would change in the absence of such prejudice should not be relevant, much less determinative, when it comes to protecting such important concerns. As this Court has emphatically stated: "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and